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QUARTERLY REPORT OF THE GENERAL COUNSEL

This report, covering the second quarter of 1975, discusses some of the more significant cases handled in the exercise of my authority to issue unfair labor practice complaints.

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JURISDICTION

Urban Development Agency as "Political Subdivision" of State

During the quarter a union which represented bus drivers of a mass transit system filed a Section 8(a)(5) charge against the urban development agency which operated the transit system. The charge raised the question whether the Board had jurisdiction over the Agency or whether the Agency was a "political subdivision" of the two States by which it had been created and thus excluded from the definition of an employer under Section 2(2) of the Act.

Investigation showed that the Agency had been created in 1949 under a compact between two States. The compact had been ratified by the State legislatures and the United States Congress, and had been signed by the President of the United States. The compact invests the Agency with all appropriate powers not inconsistent with the constitution of either State or the United States Constitution, except the power to levy taxes. The compact also requires the Agency to make an annual report to the governor of each State. One State requires that the records of the Agency be open for public inspection and duplication.

The Agency has a limited power to condemn property which, however, it cannot exercise against the property of either State, or a common carrier in interstate commerce, or of a grain elevator. State statutes grant the Agency the same tax status regarding its property and interest income as that granted to the cities in the States. The Agency is exempt from the federal excise tax on diesel fuel and the interest on Agency bonds is free from federal income tax.

The Agency is administered by a board of ten commissioners. The governor of each State, with the advice and consent of the State senate, selects five commissioners from its resident voters. The commissioners are required to reside within the metropolitan district covered by the Agency and serve staggered, five-year terms without compensation.

Since 1973 the Agency has assumed collective bargaining agreements between the Union and predecessor employers under provisions of the Urban Mass Transit Act.

These facts, we concluded, established that the Agency was created directly by two States and is administered by individuals responsible to public officials. Accordingly, we authorized dismissal of the charge on the ground that the Agency was a political subdivision

of a State within the meaning of Section 2(2) of the Act, and exempt from the Board's jurisdiction. N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tenn., 402 U.S. 600; The City Public Service Board of San Antonio, 197 NLRB 312.

PRACTICE AND PROCEDURE -- COLLYER DEFERRAL POLICY

Arbitrability of Subject Matter Not Literally Covered by Contract

The question whether a dispute over distribution of payments under a profit-sharing plan was arbitrable and therefore appropriate for deferral pursuant to Collyer Insulated Wire, 192 NLRB 837, was presented in an unusual context in a Section 8(a)(1), (3), and (5) case decided during the quarter.

The Employer and the Unions which represented certain employees of the Employer had enjoyed an amicable bargaining relationship at the plant involved for many years. The bargaining contracts between the parties have always provided for final and binding arbitration, although under the terms of the contracts grievances subject to arbitration have been limited to those regarding the meaning and application of the contracts and the arbitrator is without authority to add to, subtract from or modify the provisions of the contract. The contracts also contained clauses barring discrimination against employees. In 1943 the Employer unilaterally established a profit-sharing plan which by its express terms gave the Employer complete discretion with respect to profit-sharing distributions and provided that the Employer's decision was not subject to arbitration or any other appeal. The Employer uniformly made yearly disbursements pursuant to the plan. The parties never bargained regarding any aspect of the plan, and no bargaining contract has contained any reference to the plan.

The parties having failed to reach agreement on new contracts, the Unions, in December 1973, called a strike which lasted approximately five weeks, and as a result of which the parties reach agreement on a three-year contract. In October 1974, at the end of its fiscal year, the Employer announced that it would make profit-sharing payments to "nonstrikers" but would not do so to employees who had participated in the strike, on the ground that the strike had caused a loss in the Employer's profits. This marked the first time that the Employer had failed to make profit-sharing payments to a group of employees.

The Unions filed charges alleging that the Employer had discriminatorily refused payments to the employees who had engaged in the strike and had unilaterally changed a condition of employment. After a Section 8(a)(1), (3), and (5) complaint had issued, the Employer urged that the case be deferred to arbitration pursuant to the Board's Collyer policy. The Unions opposed deferral.

We took the view that the underlying dispute concerning the profit-sharing plan was not encompassed by the contractual grievance-arbitration machinery, and concluded that deferral was inappropriate. In support of this conclusion, the following factors were deemed significant: (1) the profit-sharing plan had never been included in the bargaining contracts; (2) it had been administered exclusively by the Employer which, until the instant dispute, had always maintained that the plan was not subject to the contract's arbitration provisions; (3) the Unions did not agree that the plan was arbitrable; and (4) the arbitration clause of the contract limited arbitration to disputes involving the meaning and application of the contract, and provided that the arbitrator could not add to, subtract from, or modify the terms of the contract. In these circumstances, and since the underlying dispute between the parties involved the profit-sharing plan, deferral on the theory that the contractual antidiscrimination clauses had been violated was deemed inappropriate. The Board's decision to defer to contractual grievance-arbitration machinery in Radioear Corp., 199 NLRB 1161, 214 NLRB No. 33, was considered distinguishable since there, while the contract was silent regarding bonuses, the underlying dispute between the parties, the subject of the bonuses, had been raised during contract negotiations and was arguably encompassed by the contractual "zipper" clause.

EMPLOYER INTERFERENCE

Checkoff of Union Fines

Contract provisions conditioning employment upon union membership are permissible under the Act if they meet the limitations of the provisos to Section 8(a)(3); and provisions requiring an employer to deduct money from the wages of employees for payment of union membership dues are privileged if employees give checkoff authorizations consistent with the restrictions of Section 302(c)(4). A recent case presented a question of the legality under Section 8(a)(1) of deductions made pursuant to individual checkoff assignments which authorized deductions for the payment of fines as well as dues.

The charged Employer was party to a collective bargaining contract which provided for union security and the deduction of "dues" from the wages of employees who signed checkoff authorizations. The checkoff form used was part of the union membership application card, and authorized the Employer to deduct from the employees' earnings money owed the Union as "dues, initiation fees, fines or assessments."

A dispute over checkoff arose after a strike was carried on at the facility covered by the contract by the charging Union, a rival of the contracting union. About 70 members of the contracting union had asisted the charging Union by picketing or by refusing to work, and the contracting union brought intraunion charges against those members and fined each $500. It informed the members that the fines should be paid immediately or would be collected under the checkoff arrangement to which each employee had agreed when he became a union member. The employees refused to pay the fines, and the contracting union, by letter, demanded that the Employer deduct the amounts from the wages of the employees.

At first the Employer refused the contracting union's demand. However, when the charging Union brought a class action in behalf of the employees seeking to enjoin the contracting union from collecting the fines and the Employer from deducting the sums, and when the contracting union filed a counterclaim seeking to collect the fines and to compel the Employer to make the deductions, the Employer filed an interpleader action and asked to pay the disputed funds into the court. The Employer then began deducting $50 each pay period from the wages of the fined employees and held the money in a separate bank account with the intention of depositing it with the court if the interpleader action was successful. The Employer explained its intention and the reason why the money was being deducted to each affected employee. When a majority of the fined employees executed a petition revoking any authority the Employer had to deduct fines from their wages, the Employer stopped making the deductions.

A Section 8(a)(1) complaint was authorized on the view that the Employer was not privileged to deduct union fines from employee wages pursuant to checkoff authorizations which were given in the context of a union-security contract. Checkoff authorizations executed in such a context, particularly where the authorizations were made as part of membership applications, were not viewed as wholly voluntary, but influenced by the union-security obligation imposed as a condition of employment.

Electric Auto-Lite Co., 92 NLRB 1073, supports this view. In that case an employee had authorized the deduction from wages of a flat sum equivalent to the union dues requirement. The union applied

the checked off sums initialy to a fine owed by the employee and, because of the resulting dues delinquency, sought the employee's discharge under the union-security contract. The Board rejected the union's argument that the checkoff authorization justified its allocation procedure, and stated:

> /A/n employee's willingness to pay the Union charges other than the regular monthly dues may not be inferred from any blanket check-off authorization . . . but should be evidenced by clear and specific authorization as to each such charge. Therefore, we cannot recognize or give effect to any procedure . . . /for checking off portions of employees' wages to pay union claims other than regular dues/ unless each specific union claim for purposes other than the regular monthly dues is clearly authorized by the employee to be checked off his earnings . . . or the employee authorizes the union specifically in each instance to apply funds . . . to pay other charges.

The Board's concern with the impact of union security requirements upon an employee's willingness to give checkoff authority is also reflected in its decisions in Penn Cork & Closures, Inc.,156 NLRB 411, and Bedford Can Mfg. Corp., 162 NLRB 1428. While those cases involved the revocability of checkoff authorizations after deauthorization of union security, the Board's statements about the union security context of checkoff authorization were deemed relevant to the view adopted in the case under discussion. In Penn Cork the Board stated:

> The Union contends, however, that the right to discontinue union membership is not the right to revoke outstanding checkoff authorizations inasmuch as signing a checkoff authorization is optional with employees and not dependent upon the existence of union security. Checkoff is optional, of course, but on the facts before us we cannot agree that the exercise of this option by employees is in all circumstances independent of the impact of union security. Here the Respondent and the Union had agreed to a contract containing both union-security and checkoff provisions. The contract not only required the employees to be union members but offered them the convenience of paying membership dues effortlessly through wage deductions which the Employer agreed to make. When executing these checkoff authorizations, the employees can hardly have been unmindful of the fact that they had to pay union dues. In these circumstances it would be unreasonable to infer that all employees who authorized the checkoff would have done so apart from the existence of

the union-security provision and the necessity of paying union dues, or to infer that these same employees would, as a whole, wish to continue their checkoff authorizations even after the union-security provision was inoperative.
[Footnotes omitted.]

In Bedford Can the Board, referring to Penn Cork, emphasized;

> The Board regarded the checkoff authorizations as an implementation of the existing union-security provisions of the contract . . . The Board observed that it would not infer that the employees who authorized the checkoff would have done so apart from the existence of the union-security provision at the time such authorizations were given.

* * *

While the facts in Penn Cork required the Board only to deal with checkoff authorizations executed when a union-security contract clause became effective, the same principle is applicable where, as here, such authorizations are permitted to renew during the existence of a series of contracts continuing a union-security provision. Both must be viewed as an implementation of the union-security provision. We will not infer in such a situation that, absent the compulsion of the union-security clause, the employees would have acquiesced in the renewal of their checkoff authorizations.

We did not consider the Employer's conduct in checking off the fines, however, to be violative of Section 8(a)(2) of the Act. The Employer stopped checking off fines as soon as notified by the employees that they were revoking any authorization of the deduction of fines from their wages. And before such notification, the Employer had placed all fines deducted in a separate bank account, thus giving no financial benefit to the contracting union. Moreover, it did not appear that the Employer had acted out of any considerations other than concern for its own liability in the face of the contracting union's demand which was based on ostensibly valid, unrevoked, checkoff authorizations. See Nathan's Famous of Yonkers, Inc., 186 NLRB 131.

To remedy the Section 8(a)(1) violation alleged, we sought the reimbursement of all monies checked off in payment of fines with interest at 6 percent, or, if the checked off funds had been earning interest in the bank account, the actual interest earned.

Discharge of Employee for Refusal to
Perform Abnormally Dangerous Work

Charges filed by two employees who were discharged when they refused, in succession, to perform work they considered extremely dangerous raised issues concerning the extent of the protection which the Act affords an employee who refuses to work under abnormally dangerous conditions.

The discharges in question occurred during a hiatus between bargaining contracts when the Employer and the Union were engaged in negotiations for renewal of an expired contract. The two employees, experienced crane operators, refused to move a crane as directed by the Employer. According to the operators, the particular crane was defective. The mechanisms which permitted it to move forward and backward, and to swing, would often lock, preventing the operator from stopping or reversing the motion of the crane. In the past the operators had complained unsuccessfully about the condition of the crane on several occasions, and one of the operators had filed a complaint under the Occupational Safety and Health Act. An OSHA inspector had then ordered the Employer to make certain repairs to the crane, and to other cranes, and to have the repairs certified by a certain date. The crane in question had not been certified, however, at the time of the incident which resulted in the discharges. On that occasion one of the two operators was assigned to "walk" the crane onto a barge so that it could be transported to another city for repairs. On the way to the dock the employee experienced malfunction in the operation of the crane and, upon arriving at the dock, refused to "walk" it onto the barge because he felt it was unsafe. "Walking" entailed taking the crane across two timber and iron planks about five-feet wide onto the barge. Later that day the second operator was sent to the dock without having been told what his job would be. When the second operator arrived, the first operator told the second of his earlier refusal to take the crane onto the barge. Later, the second operator was assigned the same job. When he entered the cab of the crane he noticed that the travel gear was loose and that nothing had been done to repair the crane since the employees' earlier complaints. He then refused to operate the crane. Sometime the same day the crane was inspected by a company mechanic who stated he was unable to assess the condition of the travel and swinger mechanisms without completely dismantling the system. He did find that there was a "wobble" on both sides of the drive shaft connected with the mechanisms. The following day the two operators were discharged for refusing to operate the crane.

Thereafter, following the discovery and repair of a defect in the crane's air lines, the crane was "walked" onto and off the barge without incident several times when being delivered for repairs and

returned to the Employer. The crane was inspected by a surveyor certified under OSHA standards, who found several defects: slightly worn roller bushings and shafts; excessive leakage in several air control lines; air leaks in the cylinder of the auxiliary drum shaft; electrical wiring and lights in bad condition; and boom pendant wires in need of replacement. About six months later, the defects were certified as having been corrected.

Upon investigation of the charges filed by the operators, we authorized a Section 8(a)(1) complaint on two alternative theories.

First, we concluded that the two operators were engaged in protected, concerted activity when they refused to operate the crane. The employees' refusal was considered to be an attempt to enforce their statutory right to demand safe conditions of employment, and therefore constituted protected activity. Cf. N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9. The refusals were deemed to be concerted in that the two employees had discussed the first employee's refusal and the condition of the crane before the second employee refused, and they were discharged together the next day.

Secondly, even if the two employees had not acted in concert, their individual refusals to work were deemed protected by the Act. It was noted that Section 502 protects the "quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions" of work, despite the existence of a no-strike clause. In the instant case, there was an hiatus between contracts and thus no no-strike clause was in effect at the time of such refusals. If Section 502 protects an employee who refuses to work under abnormally dangerous conditions where there is a no-strike clause, then, a fortiori, an employee who still has the right to strike must also be protected by the Act in such a situation. It therefore was concluded that Section 8(a)(1) protects from discharge an employee who refuses to work because of abnormally dangerous conditions.

It was concluded that operation of the crane in the case under discussion constituted an abnormally hazardous job under the standards of Redwing Carriers, Inc., 130 NLRB 1208, and Roadway Express, Inc., 217 NLRB No. 49.

In Redwing, supra, at 1209, the Board stated that Section 502 contemplates an objective test, "whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous'". The crane in question was the subject of an outstanding OSHA citation requiring that it be certified. The two employees, both experienced crane operators,

gave uncontradicted testimony that the crane had gone out of control in the past, and an Employer mechanic had found wobbles in the drive shaft on the day of the refusals to operate it. We also noted that the crane had not been "walked" onto the barge until after the discovery and repair of leaks in the air lines. Thus, we concluded that the crane was, in fact, in an abnormally dangerous condition. Finally, even if the crane were not in fact in an abnormally dangerous condition, the employees' belief that it was was amply supported by the above "ascertainable objective evidence". Roadway Express, supra.

EMPLOYER DISCRIMINATION

Discharging Employee for Honoring Picket Line

One Section 8(a)(3) case decided in the quarter required application of the principles of Redwing Carriers, Inc., 137 NLRB 1545, and an interpretation of a "picket-line" provision of a bargaining contract.

The Employer, which operated a ready-mix concrete plant, and the Union were parties to a collective bargaining agreement which contained a provision that:

> It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including primary picket lines of Unions party to this Agreement, and including primary picket lines at the Employer's place of business.

The contract also provided that ". . . neither party shall order or permit any walkout, strike or lockout".

The Employer secured a contract to deliver concrete to a construction project. At the time deliveries to the project began, another labor organization set up a picket line at the site protesting conditions maintained by a nonunion contractor at that site. The Employer's two concrete drivers repeatedly refused to cross the line to make concrete deliveries despite the Employer's assertions that the line was "informational" and secondary and outside the provisions of the aforementioned clause. A few small deliveries were made by having the Employer's manager drive across the line. However, a point was reached when the site began to require the regular delivery of concrete in volume. After making extensive efforts with the drivers and representatives of the Union to reach some accommodation in the matter,

the Employer's manager discharged the two drivers after they again refused to cross the picket line. Each driver received a letter which read:

> This letter is to serve as notification that our company feels that you have violated your contract by refusing to cross the informational (secondary) picket on the . . . Project . . . It also serves as notification that you are discharged from our employ for refusing to cross said picket line.

On the evening of the day the discharges occurred, the Employer hired two new drivers who began making deliveries the following day.

We concluded that a complaint alleging the Employer's discharge of the drivers as violative of Sections 8(a)(1) and (3) was warranted. The complaint was premised on the following arguments: First, the drivers, in refusing to cross the picket line, were engaged in a protected concerted activity inasmuch as the picket line was not secondary in character within the proscriptions of Section 8(b)(4)(B), and was not otherwise unlawful under the Act.

Second, the contract explicitly provided that an employee's refusal to cross a primary picket line "shall not be a violation of this Agreement" and proscribed discharge or dismissal for such a refusal. Accordingly, the drivers' refusal to cross the picket line did not constitute a violation of the no-strike or any other provisions of the agreement.

Third, the Employer's letter of dismissal evidenced an intention to effect an actual discharge of the drivers and not merely a "replacement" of them with other employees willing to perform the work. See Redwing Carriers, supra. The Employer's letter notifying the drivers that they were discharged indicated that the reason for the discharge was their refusal to cross a picket line. It characterized the line as "informational (secondary)", and stated that the employees' conduct "violated /the/ contract". In effect, the Employer took the position that because the drivers' refusal to cross the line did not fall within the picket-line provision of the contract, it was rendered unprotected by the no-strike provision of the agreement and it was by reason of violation of the no-strike provision that the Employer was discharging them. The letter did not suggest that the drivers were merely being replaced or that they would be reinstated when and if they were willing to perform the work before replacements were secured or when job openings occurred. In these circumstances,

it was clear that the Employer sought to discharge the employees in reprisal for their conduct and not to merely replace them so that it could run its business.

Fourth, since the drivers' refusal to cross the picket line constituted protected concerted activity and since the ground upon which the Employer relied in effecting their discharge for this activity was plainly invalid in law, the fact that the Employer may have believed in good faith that their activities were unprotected did not privilege its discrimination against them. N.L.R.B. v. Burnup & Sims, Inc., 379 U.S. 21.

We did not base the complaint upon an argument that the Employer had contractually waived a Redwing Carriers defense, i.e., a defense that its conduct was for the sole purpose of running its business. The clause was not considered to clearly indicate that the Employer was waiving its rights to replace employees who refused to cross the picket line. Rather, the clause can be reasonably construed as simply being an amendment to the no-strike clause. The latter clause provided that "neither party shall order or permit any walkout, strike or lockout". This clause would both subject the Union to a breach of contract claim and subject participating employees to disciplinary measures, including discharge in the event of a strike and employee refusals to cross a picket line at the direction of the Union. The picket-line provision seemed intended to relax the contractual proscriptions of the no-strike clause to a limited extent, so that an individual employee's honoring a picket line would not constitute a violation of the agreement subjecting him to retaliatory discharge or discipline under the no-strike clause. Under this construction of the picket-line clause, an employee's honoring a picket line constitutes a protected concerted activity, as it would in the absence of a no-strike provision. However, it would be an activity subject to steps the Employer may wish to take under Redwing. Accordingly, under the clause, the Employer has the right under Redwing to permanently replace employees individually honoring picket lines in the interest of maintaining operations and making deliveries. In the instant case, the Employer went beyond these steps.

UNION DISCRIMINATION

Conditioning Dispatch of Low-Income Residents Upon Immediate Payment of Part of Union Security Obligation

Attempts by low-income residents to obtain jobs on a construction project resulted in recent Section 8(b)(2) and (1)(A) charges against a union which had an exclusive referral arrangement with the employer on the project.

The Employer was working on a construction project financed by the Department of Housing and Urban Development, which has a policy of encouraging the hiring of low-income local residents on projects it sponsors. A community anti-poverty organization, which subsidizes employement for economically disadvantaged residents with funding under the national Comprehensive Employment Training Act, sought to place individuals at work on the project. The Employer told the organization it would have to make appropriate arrangements with the Union with which the Employer had a bargaining contract providing for union security and exclusive job referral.

The Union agreed with the anti-poverty organization to dispatch several low-income community residents to the construction jobs, but did so on the condition that the residents pay the Union one-half its initiation fee before beginning employment. The Union asserted that this requirement for advance payment of the union-security obligation under the bargaining contract was made because of concern that many of the residents would not remain employed for the seven-day statutory grace period and the Union would be unable to collect any initiation fees or dues from them.

An individual resident who was required to pay one-half the Union initiation fee before being dispatched to the construction project, filed charges against the Union, and we authorized complaint. We based the complaint on the view that by conditioning referral under its union-security contract upon the immediate payment of one-half the initiation fee, without allowing the seven-day statutory grace period, the Union violated Sections 8(b)(2) and (1)(A). The Statute requires that contracting parties afford employees a specified grace period before imposing union-security obligations upon them, and no warrant was seen for the Union's denial of the grace period. Cf. Campbell Soup Co., 152 NLRB 1645; Harder's Construction Co., 146 NLRB 698, involving a Section 8(f) contract; Chun King Sales, Inc., 126 NLRB 851; Argo Steel Construction Co., 122 NLRB 1077. Indeed, the Board has held it unlawful for parties to a union-security agreement to require new employees, as a condition of employment, to signify in advance an intent to join the union. Argo Steel Construction Co., supra.

We were not persuaded by the Union's contention that the initiation fee requirement was privileged as the Union was attempting to accommodate to a government policy encouraging the hiring of low-income local residents. There is nothing in the Act, nor any clear direction of other federal law, to permit relaxation of the Act's restrictions on union security. Nor was there any agreement between the Union and a federal agency purporting to permit the asserted accommodation. The Union could not disregard its express obligations under the Act, and if seeking to support another policy, could have made an accommodation consistent with the Act.

SECONDARY BOYCOTTS

Picketing Warehouse Which Stored Products of Primary Employer

A Section 8(b)(4) case was presented during the quarter which required a determination of whether the premises of a warehouser which stored products of a manufacturer with which the charged Union had a primary dispute, constituted a common situs which the Union was privileged to picket.

The warehouser operated several public warehouses used by unrelated employers, including the manufacturer involved in the instant primary dispute. There was no contract between the warehouser and the manufacturer, but for several years the manufacturer had used the warehouse facility involved for the purpose of storing its products before ultimate delivery to its customers. The products were delivered from the manufacturer to the warehouse by a transportation company related to the warehouser but not to the manufacturer. The transportation company also carried mail pouches between the two employers. The employees of the warehouser unloaded the manufacturer's products from the transportation company's trucks and stored them in the warehouse. They also picked up and prepared orders for shipment to the manufacturer's customers. The manufacturer had no employees who worked at the warehouse. The manufacturer's traffic manager visited the warehouse only about once a month for the limited purpose of reviewing inventory.

The charged Union, which represented both the manufacturer's employees and those of the warehouser, struck the manufacturer. On the second day of the strike the Union began picketing the driveway leading to the warehouse with signs stating that the employees of the manufacturer were on strike. The Union, however, instructed the warehouse employees not to honor the picket line.

We concluded that the picketing at the warehouse violated Section 8(b)(4)(i)(ii)(B). The warehouse was viewed as the neutral premises of the warehouser and not as a common situs, so that the Union's picketing of the warehouse was deemed to be unprivileged. Thus, it was concluded that the manufacturer was not engaged in its normal business at the warehouse. None of its employees ever performed any work or even had occasion to enter the premises of the warehouser. No contractual arrangement was in effect between the manufacturer and the warehouser, and the latter did not appear to retain any direct control over its products once they left the manufacturer's location. The fact that the manufacturer's traffic manager, a supervisor as defined in Section 2(11) of the Act, went to the warehouse once a month was not considered sufficient to make the

warehouse a common situs of the primary dispute with the manufacturer. See Teamsters, Local 315 (Insured Transporters, Inc.), 195 NLRB 56; Building and Construction Trades Council (Silver View Associates), 216 NLRB No. 55.

Several Board decisions were considered distinguishable: Steelworkers (Auburndale Freezer Corp.), 177 NLRB 791, revd. and remanded 434 F. 2d 1219 (C.A. 5), 191 NLRB 1; Teamsters, Local 294 (Montgomery Ward & Co.), 192 NLRB 155; Cement Masons, Local 521 (Kroger Co.), 183 NLRB 1109. In the Auburndale case, the employees of the primary employer had substantial contact with the picketed warehouse. In Montgomery Ward the primary employees had potential access to the premises being picketed pursuant to the terms of the lease agreement between the primary employer and the owner of the picketed premises. In Kroger, the primary employer maintained an office with office clerical employees at the picketed location. Although picketing of the primary employer at that location occurred on Saturday when the primary employer's office was closed, work remained to be performed at the location by the primary employees who had been removed at the request of the picketed employer.

Inasmuch as the situs of the primary dispute in the instant case was not considered ever to have been located on the warehouse premises, the Union's picketing was deemed to have had the proscribed object of forcing the neutral warehouser to cease doing business with the manufacturer and with other persons, including the manufacturer's customers and common carriers. The fact that the Union told the warehouse employees to disregard the picket line was not seen to warrant a different conclusion, given the fact that the warehouse was to be considered a secondary site. A Section 8(b)(4)(i)(ii)(B) complaint was accordingly authorized.

EXCESSIVE OR DISCRIMINATORY FEES - SECTION 8(b)(5)

"Rejoining Fee"

Section 8(b)(5) of the Act prohibits a union from assessing excessive or discriminatory fees against employees who are subject to contractual union security obligations. The Section directs the Board, in determining whether a fee is excessive or discriminatory, to consider, among other relevant factors, the practices and customs of labor organizations in the particular industry and the wages currently paid to the employees affected. Fees established by a union need not be uniform for all employees, but differences in fees must be based upon a reasonable classification of employees. See Ferro Stamping and Mfg. Co., 93 NLRB 1459; Food Machinery and Chemical Corp., 99 NLRB 1430.

During the quarter we considered whether a reinstatement fee imposed by a union on former members was proscribed by Section 8(b)(5). In the course of an economic strike in support of the Union's contract renewal demands, a substantial number of employees had resigned from the Union, crossed the picket line and returned to work. At the end of the strike these employees rejoined the Union, as required by the union-security provision of the bargaining contract. The Union assessed the employees a "rejoining" fee which was double the amount of the regular initiation fee, and requested the Employer to deduct the fees from the employees' wages pursuant to checkoff authorizations. The Employer refused to do so, pointing out that no employee had ever been charged a fee to rejoin the Union after he had resigned.

In setting the fee, the Union relied on a section of its constitution which provided:

> The first month's dues for any member who fails to surrender his Honorable Withdrawal and Transfer Certificate or for any member who has been suspended and dropped from membership for failure to pay his dues and fines levied in accordance with the provisions of the Constitution and who seeks again to become a member shall be that amount which is equivalent to four (4) month's dues at the regular rate then prevailing in the Local Union in which he seeks membership.

The Union took the position that the employees referred to by the Employer, who had not been charged a reinstatement fee, were in a different category from those against whom the Union assessed a "re-joining" fee. The former employees, the Union asserted, had not obtained honorable withdrawal cards at the time they resigned from the Union, but they were entitled to such cards because they had been in good standing when they left the Union. The Union maintained on the other hand, that the instant employees who were charged a reinstatement fee were not in good standing at the time they resigned because prior to their resignations they had engaged in conduct in violation of the Union's constitution.

In the circumstances, we saw substantial basis for concluding that the reinstatement fee was imposed upon the employees because they had resigned from the Union to cross the picket line during the course of the strike. As the fee was imposed because the employees had engaged in conduct protected by Section 7 of the Act, we concluded it was not based on a reasonable classification, that it conflicted with protected employee rights and basic policies of the Act and it was discriminatory within the meaning of Section 8(b)(5) of the Act. Thus complaint was authorized. See Ferro Stamping and Mfg. Co., supra.

Bargaining Order to Remedy
"Outrageous" 8(a)(1) and (3)
Violations

In N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, the Supreme Court considered the issue of whether a duty to bargain could be established without a Board election and the question of whether the Board had authority to issue bargaining orders to remedy unfair labor practices. The Court recognized the Board's authority to issue a bargaining order, even in the absence of majority status, in the exceptional case where unfair labor practices are so "outrageous" and "pervasive" that they cannot be eliminated by traditional remedies and thus a fair election cannot be held. The Court also recognized the propriety of a bargaining order in a case marked by less pervasive unfair labor practices, where there is a showing that, at one point, the union had majority status and the unfair labor practices have a tendency to undermine the majority strength and impede the election process, so that, on balance, employee sentiment once expressed by authorization cards would be better protected by a bargaining order. See 37 NLRB Annual Report 101; Steel-Fab, Inc., 212 NLRB No. 25. We applied these principles to a case which arose during the quarter.

Within five days of the start of an organizational campaign, the charging Union secured authorization cards from what appeared to have been a majority of the employees in the unit. The Employer responded to the Union's demand for recognition by undertaking a massive campaign of unlawful conduct calculated to undermine and preclude further support for the Union. The conduct included repeated unlawful interrogation of employees, threats of discharge, creating the impression of surveillance, the discriminatory assignment of more arduous tasks to employees, the discriminatory closing of a store, and unlawful transfer and discharge of employees. As a result of the unlawful campaign and the fear engendered among employees, the Union was effectively prevented from securing additional authorization cards. The Union filed Section 8(a)(1), (3) and (5) charges.

Without addressing the question whether the Employer had violated Section 8(a)(5), we concluded that a bargaining order was warranted to remedy the Section 8(a)(1) and (3) conduct. 1/ We took

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1/ The Board's decision in Trading Port, Inc., 219 NLRB No. 76, was issued after this case was authorized for complaint. In that case, the Board indicated that it would find a Section 8(a)(5) violation in "refusal-to-bargain" cases arising under Gissel, supra.

the position first that the Employer's unlawful conduct made a fair election in the unit unlikely and required a bargaining order based on the Union's card majority, assuming that such majority can be shown.

Further, even assuming that the Union had not obtained majority status, its failure to do so was considered directly attributable to the Employer's unfair labor practices and, but for the commission of such unlawful acts, the Union would have secured card majority status. Thus, the facts showed that the Union was successful in obtaining signed cards relatively quickly and easily until the massive Employer unfair labor practices commenced, at which time employees stopped signing union cards. Accordingly, we deemed it proper to conclude that a majority of employees would have signed authorization cards but for the Employer's illegal conduct.

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

IMMEDIATE RELEASE

(R-1763)
202/632-4950

CORRECTION - QUARTERLY REPORT OF THE GENERAL COUNSEL

Inadvertently, an undetected typographical error occurred in the report of the General Counsel covering cases decided during the second quarter of calendar year 1985, which issued on 17 March 1986. The error appears on page 1 of the report under the heading "EMPLOYER DISCRIMINATION, Concerted Refusal to Work Full Day," in paragraph three, line two, which reads: "Accordingly, the discharges were unlawful." That typographical error is corrected to read as follows: "Accordingly, the discharges were lawful."

Any inconvenience that this typographical error may have caused is regretted; please correct your copy of this Quarterly Report to reflect the noted correction.

Rosemary M. Collyer
General Counsel

NATIONAL LABOR RELATIONS BOARD
DIVISION OF INFORMATION
WASHINGTON, DC 20570

17 March 1986

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Monday, 17 March 1986

(R-1763)
202/632-4950

QUARTERLY REPORT OF THE GENERAL COUNSEL

This report covers cases decided during the second quarter of calendar year 1985. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I have sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

Rosemary M. Collyer
General Counsel

Concerted Refusal to Work Full Day

In one unusual case considered during the quarter, we were presented with the issue of whether employees who left work early because of snowy road conditions were engaged in protected activity.

The Employer was engaged in the business of processing chickens. Its employees were not represented by a union. As these employees arrived for work, a heavy snow began to fall. The plant was in a rural area and most employees had to drive long distances between their homes and work. As the morning wore on, it became clear that roads were becoming hazardous. The employees discussed among themselves the possibilty of leaving work early. They also discussed the matter with Employer representatives. In doing so, they did not ask the Employer to permit them to leave early. Rather, they told the Employer that they intended to leave work early. The Employer warned them that they would be subject to discipline if they did so. The Employer explained that an early mass departure would cause an irreparable loss of large numbers of chickens. Notwithstanding this, twenty-four employees left early. The Employer discharged these employees.

We concluded that the employees were not engaged in protected activity when they left work early. Accordingly, the discharges were unlawful. Concededly, the dispute involved working hours. That is, the employees wished to leave work early and the Employer wanted the employees to stay the whole day. It is clear that employees can concertedly protest with respect to such matters as working hours. However, the employees in our case did not leave work early as a protest against the Employer's policy regarding working hours. That is, they did not petition their Employer to make a change regarding working hours and then strike in support of such a request. Rather, the employees decided, on their own, to leave work early on that day. They told the Employer that they would leave early and the Employer responded that they might be disciplined for doing so. In these circumstances, we concluded that the employees were unilaterally setting their own terms and conditions of employment. Such conduct is not within the ambit of Section 7 of the Act. See John S. Swift, 124 NLRB 394; Kohler Co., 108 NLRB 207; C.G. Conn Ltd.., 108 F. 2d 390. Accordingly, the discharges were lawful.

EMPLOYER REFUSAL TO BARGAIN

Successor's Refusal to Comply With Bargaining Order Imposed on Predecessor

One case considered during the quarter presented the question of whether a bargaining order imposed against an employer could be enforced against a successor employer.

The Board issued a decision and order finding that the predecessor employer committed unfair labor practices during an organizational campaign which were so serious as to make it unlikely that a fair election could be held. See NLRB v. Gissel, 395 U.S. 575. Accordingly, the Board ordered the predecessor employer to recognize the union in two separate units of employees. Thereafter, the court of appeals enforced the Board's order.

Shortly after the court issued its judgment, the predecessor sold the enterprise to a successor. The successor was aware of the Board order and court decree.

After purchasing the enterprise, the successor continued its operation without hiatus, retaining the former employees of the predecessor and hiring no additional employees. However, very few of these employees had been in the unit at the time of the predecessor's unfair labor practices. In this regard, the evidence showed that unit A had 7 of the 21 employees who were employed at the time of the predecessor's unfair labor practices. The comparable figures for unit B were 70 of 164.

The successor argued that a fair election could be held and that a bargaining order should not be imposed. In this regard, the successor noted that it had committed no unfair labor practices. Further, very few of the individuals employed at the time of the predecessor's unfair labor practices were now on the scene.

We concluded that the issue should be presented to the Board. Accordingly, we will argue to the Board that the bargaining order should be imposed against the successor. In this regard, we noted that the Board has issued bargaining orders against successors in similar circumstances. See Webb Tractor & Equipment, 181 NLRB 230; Ponn Distributing, Inc., 232 NLRB 312; Winco Petroleum, 252 NLRB 1049. We recognized that a circuit court denied enforcement to the Board's order in Ponn. 578 F. 2d 892. Subsequently, in Winco, where the Board again imposed a bargaining order against a successor, the Board noted that the predecessor's obligation to bargain was based upon voluntary recognition as well as Gissel. The Board therefore distinguished the court's decision in Ponn, noting that, in that case, the "imposition of a bargaining order on the successor had been based solely on a Gissel bargaining order issued against the predecessor."

In light of the above, there is an open issue as to whether the Board would acquiesce to the views of the court in Ponn. That is, if the predecessor's bargaining obligation is based solely on Gissel, and the unit has undergone a substantial change, would the Board issue a bargaining order against the successor employer?

Because the issue is an open one and because the Board has entered bargaining orders against successors in circumstances where the order against the predecessor was based entirely on Gissel, we decided to seek a bargaining order in our case and thereby place this issue before the Board.

Remedial Bargaining Order Against Employer and Successor Employer

In one case considered during the quarter, we dealt with the issue of whether a remedial bargaining order was warranted against an employer and whether any such order should be imposed against a successor employer.

In February 1984, the Union filed a petition for an election in a unit consisting of 55 employees of Employer X. On June 30, 1984, prior to the holding of any election, Employer X sold the plant to Employer Y. Prior to the sale, Employer X committed the following violations of Section 8(a)(1): interrogation; threats to close the plant if the Union were selected; threats that employees would lose benefits and/or be discharged if the Union were selected; promises that problems would be easier to solve without a Union; and statements that prounion employees would not be hired by the potential purchaser of the plant. In addition, Employer X attempted to "pack" the unit by transferring employees to its facility for the purpose of defeating the Union in the election. Finally, Employer X violated Section 8(a)(3) by enforcing work rules more stringently because of the Union and by issuing warning letters to six employees because of their Union activities.

As noted above, the plant was sold on June 30 to Employer Y. Employer Y hired 25 predecessor employees into its 50-employee unit. However, the evidence established that it discriminatorily failed to hire nine additional predecessor employees.

We concluded that the unfair labor practices of Employer X were sufficient to warrant the imposition of a remedial bargaining order against it if it were still the Employer of the unit employees. In EMR Photoelectric, 273 NLRB No. 32, the Board stated that the issue of whether a remedial bargaining order should be imposed turns on "whether it would be infeasible to hold a new fair election because of the lingering aftermath of the unfair labor practices committed in the previous campaign." In the instant case, Employer X resorted to the stratagem of packing the unit in order to defeat the Union in an upcoming election. In our view, few other actions by an employer could be as effective in convincing the employees that a fair election would be impossible. In addition, as noted above, the Section 8(a)(1) conduct included

threats to close the plant and to discharge employees because of Union activities. These threats were made by high company officials and were communicated to many of the unit employees. In addition, as also noted above, Employer X committed Section 8(a)(3) violations.

In light of the foregoing and in view of the fact the Union had obtained majority support during the time that Employer X operated the plant, we concluded that a bargaining order would be warranted against Employer X if it were still the employer.

We further concluded that the remedial bargaining order should be imposed against Employer Y. Employer Y continued the unlawful campaign by refusing to hire nine of the predecessor's employees. Where a successor employer continues the predecessor's unlawful antiunion campaign, it is appropriate to enter a remedial bargaining order against it. See Carlton's Market, 243 NLRB 837, 845. In addition, we noted that, but for the discriminatory refusal to hire, the predecessor employees would have constituted a majority of Employer Y's bargaining unit. Finally, we noted that Employer Y bought the facility with knowledge of the charge and complaint that had issued against the predecessor.

Duty to Supply Information Regarding a Related Company

One case considered during the quarter raised the issue of whether an employer had a duty to supply information concerning its relationship to another employer.

Corporation A had a contract with the union. In early 1984, corporation B was formed, and it commenced operations on a nonunion basis. Mr. X was a majority shareholder in both corporations. However, there was no commonality of officers.

The Union believed that corporation A was performing unit work through corporation B and was thereby breaching the collective bargaining agreement. The Union asked the president of corporation A for information concerning the relationship between corporations A and B. The president of corporation A responded that he held no office or interest in corporation B and therefore knew nothing about that corporation. He suggested that the questions be directed to Mr. X, the majority shareholder of both corporations. The Union thereupon sent the request for information to Mr. X. Mr. X's response was that, inasmuch as he was not an officer of either corporation, he was in no position to respond on behalf of either corporation. The Union thereupon filed a Section 8(a)(5) charge alleging a failure by corporation A to release information concerning its relationship to corporation B.

In our view, the Union had a reasonable basis for requesting information concerning the relationship. Thus, for example, the Union learned that a job ostensibly awarded to corporation A was in fact performed by corporation B. In addition, the Union learned that four employees of corporation B were former employees of corporation A. And, of course, the majority shareholder of both corporations was the same individual.

We rejected corporation A's defense that it did not have the information. In this regard, we noted that corporation A did not say that it was unable to obtain the information from corporation B. And, given the fact that the two corporations were majority-owned by the same person, it was at least possible that corporation A could have acquired that information. In these circumstances, we concluded that corporation A should have made every reasonable effort to obtain the information from corporation B. In the absence of such an effort, we concluded that issuance of complaint was warranted. See Doubarn Sheet Metal Workers, 243 NLRB 821, 824; Beyerl Chevrolet, 221 NLRB 710, 721; Borden, Inc., 235 NLRB 982, 983.

UNION RESTRAINT AND COERCION

Union's Imposition of Fine on Employee For Having Protested to Employer

During this quarter, we considered one case that involved tension between a union's right to promulgate and enforce internal rules and an employee's right to present grievances to the employer.

The charging party, an employee of the Employer and a member of the Union, began experiencing problems in his relationships with his fellow employee-members. More specifically, he alleged that he was the target of vulgarities and racial slurs from his fellow employee-members at the workplace. The charging party wrote the Union that he intended to tell the Employer about his problems with one particular employee-member. A copy of the letter was sent to the Employer.

The Union fined the charging party for sending a copy of his letter to the Employer. The Union relied upon an internal union rule that forbade members from engaging in actions that might jeopardize the job of a fellow member. The charging party alleged in his NLRB charge that the fine was unlawful.

In analyzing the issue, we noted that a union may impose reasonable fines on their members in order to enfore a properly adopted rule which reflects a legitimate union interest. See Scofield v. NLRB, 394 U.S. 423; NLRB v. Allis Chalmers, 388 U.S. 175; Local 5995 CWA, 192 NLRB 556. However, if the union rule impairs a policy that Congress has embedded in federal labor law, the rule cannot be enforced. See Scofield, supra.

In the instant case, the Union may well have had a legitimate interest in preventing members from jeopardizing the jobs of fellow-members. However, the Union's conduct conflicted with rights guaranteed employees under Section 9(a) of the Act. Section 9(a) provides that "any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without intervention of the bargaining representative", so long as the adjustment is not inconsistent with the contract and the union is given an opportunity to be present.

Section 9 does not give the employee the right to compel the employer to consider the grievance; it merely permits the employee to present the grievance and authorizes the employer to hear and adjust the grievance. The Board has held that an employer may not discipline an employee for the act of grieving. A contrary result would "lead to the incongruous result of, on the one hand, granting an employee freedom to present his complaints to his employer without the intervention of the bargaining representative and, on the other, subjecting that employee to the peril of discharge should his complaint contradict the terms of the contract." Eastern Illinois Gas & Securities Co., 175 NLRB 639, 640; The Singer Company, 198 NLRB 870.

In our view, it would similarly be incongruous to grant to employees the privilege of presenting grievances directly to their employer without the intervention of their bargaining representative while, at the same time, permitting that representative to coerce or restrain the employee with respect to that privilege.

In the instant case, the employee complained to the Employer about the conduct of a fellow employee. The employee also went to the Union, and there was nothing to indicate that the employee intended to seek an adjustment that would be inconsistent with the collective bargaining agreement or to exclude the Union from being present at any such adjustment. Hence, the employee was exercising a privilege protected by the Act. The Union's discipline of the employee coerced him for having exercised that privilege. Since the Union's discipline offended a principle that is established by the statute and well-embedded in federal labor law, we concluded that such discipline was unlawful under Section 8(b)(1)(A).

Constructive Resignation from Membership in Union

In one case considered during the quarter, we were presented with the issue of whether certain union members should be deemed to have resigned so as to avoid union discipline.

In the case before us, a group of employee-members sent letters of resignation and then crossed the Union's picket line. The Union would not accept the requests to resign, citing its rule against resignation. We concluded that the rule was unlawful and that the Union could not discipline these employees. See IAM Local 1414 (Neufeld Porsche-Audi), 270 NLRB 1330. However, another group of employees did not attempt to resign. They crossed the Union's picket line and were disciplined. They argued that the Union rule restricting resignation was unlawful and that, but for the rule, they would have attempted to resign. The issue was whether the employees who did not attempt to resign should be viewed as constructive resignees, so that the Union's discipline of them would be unlawful.

The evidence indicated that the employees were aware of the Union's rule against resignation. In addition, some of the employees were told by Union officials that they could not resign. Further, these employees then told other employees that the Union would not accept resignations.

In Columbia Machine, 274 NLRB No. 26, the Board held that if a union reasonably creates in the minds of its members the impression that any attempt to resign from the union would be futile, such employees can be viewed as resignees even if they do not attempt to resign. The Board said that an objective standard, rather than a subjective one, would be used to determine whether the employees reasonably believed that a resignation effort would be futile. Thus, the mere fact that an employee believed that it would be futile to resign would not be enough. In addition, the Board made it clear that the existence of a provision restricting resignation, and member knowledge of such provision, would not by itself provide a reasonable basis for believing that a resignation attempt would be futile.

We applied Columbia Machine to the facts of our case. Where the evidence simply showed that an employee was aware of the provision restricting resignation, that employee was not viewed as a constructive resignee. However, where Union officials told employees that this provision would be enforced, such employees were viewed as resignees. Finally, in the latter situation, where the employees then told other employees that the Union would not permit resignation, the latter employees were viewed as constructive resignees as well. Consequently, as to the latter two groups, we took the position that the Union could not discipline these employees even though they made no effort to resign.

Union's Picketing of Home of Employer's Negotiator

In one case considered during the quarter, we were presented with the issue of whether a union's picketing at the home of an employer's negotiator was violative of Section 8(b)(1)(B).

The Employer was engaged in the building and construction industry and had a collective bargaining agreement with the Union. The most recent contract expired on April 30, 1984, and the parties were negotiating for a new contract. The Employer's chief negotiator was its vice-president.

On June 8, 1984, the Union began picketing the Employer's jobsite. On October 3, 1984, the Union began picketing the home of the vice-president negotiator. The picket signs bore the names of the Union and the Employer and said "no contract no work". The picketing at the home of the vice-president-negotiator was especially upsetting to his wife who had a history of hypertension.

We concluded that the picketing was unlawful. The Board has held that where the necessary result of violence or threats directed to employer representatives is to limit the ability of such representatives to perform their bargaining or grievance functions, such conduct constitutes a violation of 8(b)(1)(B) even though the violence or threats were not specifically aimed at compelling ouster of the representative or changing the position of the representative. Teamsters Local 856 (L. Lion and Sons Company, Inc.), 195 NLRB 967, 971. Further, in Broadway Hospital, Inc., 244 NLRB 341, 345, the Board concluded that a union agent's vulgar and threatening remarks directed to the employer's chief negotiator affected the negotiator in the performance of his functions as the employer's bargaining representative, and therefore were violative of Section 8(b)(1)(B).

In the instant case, the picketing was admittedly peaceful, and did not involve any threats or use of vulgarity. On the other hand, the picketing did have a demonstrable effect on the spouse of the Employer's negotiator. Faced with this picketing, the negotiator clearly understood that the harm to his wife could be relieved only if he modified his bargaining position or withdrew as the negotiator. In these circumstances, the effect of the picketing was to restrain or coerce the Employer in its right to have a negotiator of its choice who would espouse the Employer's position in bargaining. The fact that the Union may not have intended to restrain or coerce the Employer with respect to these matters does not require a contrary result. See Teamsters Local 856, supra.

We rejected an argument that the picketing was protected by the First Amendment. The Union was not seeking to convey an idea or message to the public. If that were its objective, it likely would not have picketed in a residential neighborhood. In addition, the Union was permitted to picket at the Employer's construction sites which were located in public areas. In these circumstances, we concluded that the object of the picketing was not to convey a message to the public but rather to place pressure on the negotiator and force him to change his position or withdraw from the bargaining.

PROCEDURE IN UNFAIR LABOR PRACTICE CASES

Deferral to Arbitration Award

One case considered during the quarter presented the issue of whether a charge should be dismissed by reason of the deferral principles enunciated in Olin Corp., 268 NLRB 573.

The Employer and the Union went to arbitration because they could not agree on the standards to be used in selecting ten employees for layoff. The arbitrator decided productivity, attitude, adaptability and cooperation were among the factors that were to be considered in selecting employees for layoff. He retained jurisdiction to resolve any disputes arising out of the Employer's application of the arbitral decision.

Thereafter, the Employer developed specific criteria and a point system for selecting ten employees for layoff. It then laid off the ten employees with lowest scores. The Charging Party was one of the ten. He filed a Section 8(a)(1) and (3) charge alleging that he was selected for layoff because of his union activities as steward. The Regional Director deferred the charge under Dubo Mfg., 142 NLRB 431, noting that the Employer and the Union had gone back to the arbitrator on the issue of whether the Employer had correctly implemented the initial arbitral decision.

In the second arbitral hearing, the arbitrator dealt primarily with the question of whether the Employer's system (ten criteria and use of points) and the Employer's selection of the ten employees for layoff were in conformity with the first arbitral opinion. With the issue thus phrased, the arbitrator was not required to deal with the issue of whether the real reason for the selection of any of the ten employees was union activity. The Union urged the arbitrator not to deal with this issue, and the Employer urged him to do so. The issue of whether he would do so was not resolved at the hearing. However, in his subsequent decision, the arbitrator expressly noted the NLRB charge, and noted the Regioal Director's Dubo letter in the case. He then said that "the letter now requires of me that I address myself to the charge as fully as the evidence I have permits." The arbitrator then went on to conclude that "the evidence submitted in the hearings contained no evidence which could support the charge of improper discharge for reason of union action." The arbitrator concluded that "the method which the Company developed and applied complied with my direction that the factors of productivity, attitude, adaptabilty and cooperation be used. . . ."

We decided to defer to the arbitrator's decision. Concededly, all of the "8(a)(3)" evidence was not introduced before the arbitrator. Indeed, the Union, which would be the likely source of this evidence, took the position that the arbitrator should avoid the statutory issue. However, in Olin, the Board made it clear that it does not require that all, or even substantially all, of the evidence on the statutory issue be presented to the arbitrator. The Board requires only that the arbitrator be "presented generally with the facts relevant to the unfair labor practice." In this case the arbitrator was presented with the Employer's denial that union activities played a role in the Charging Party's selection for layoff, and with the Employer's explanation of the factors that were relied upon in making selections for layoff. In essence, the arbitrator was presented with, and believed, the evidence showing that the charging party and the others were lawfully selected for layoff.

In the foregoing circumstances, we concluded that the charge should be dismissed, absent withdrawal.

Final Decision That Starts Section 10(b) Period

In one case considered during the quarter, we were presented with an interesting Section 10(b) issue in the context of a union fine.

The Union's decision to fine the charging party was made outside the Section 10(b) period. However, under the Union's constitution, the charging party could appeal the decision to the International president. The charging party appealed the decision and the International president reduced the amount of the fine. The charging party received notice of the president's decision within the Section 10(b) period.

We concluded that, in order to clarify the law in this area, we would argue to the Board that the charge was not time-barred.

In a series of cases, the Board has held that where a fined union member appeals the fine through an internal union appeals procedure, the fine does not become a final act until the member is notified of the disposition of the appeal. The Section 10(b) period begins running from that time. See, e.g. New Mexico District Council of Carpenters (A.S. Horner, Inc.), 176 NLRB 797; CWA Local 9511 (Pacific T & T), 188 NLRB 433.

Subsequent to these cases, however, the Board decided U.S. Postal Service, 271 NLRB No. 61. In that case, the Board held that a final and irrevocable decision to discharge an employee is the act which begins the 10(b) period, rather than the actual discharge itself. Further, the mere fact that the employee appealed his discharge to the Merit Systems Protection Board, an agency of the U.S. Government, did not toll the running of the Section 10(b) period.

Applying Postal Service to the instant case, it is at least arguable that the Section 10(b) period began to run at the time of the initial decision to fine the employee, rather than the actual imposition of the fine or the upholding of that decision. However, five days after Postal Service was decided, the Board decided Laborers Local 135 (Bechtel Power), 271 NLRB No. 127. In that case, without any discussion of Postal Service, the Board adhered to its prior rule that a decision to impose a union fine is not final until the disposition of any appeal filed.

In these circumstances, we decided to place the issue before the Board. We will argue that Postal Service is distinguishable from Laborers Local 135 and our case in that Postal Service involved an appeal to an external agency rather than an appeal to an internal body. In the latter situation, it can be argued that the respondent institution does not make the decision until the highest authority of the institution makes the decision.

We recognized that Delaware State College v. Ricks, 449 U.S. 250, 261, cited with approval by the Board in Postal Service, appears to be to the contrary. In that Title VII case, the employee appealed his decision through the internal hierarchy of the university, and yet the time limitation period began with the initial decision to discharge. However, given the state of Board law on the subject, in the context of a union fine, we decided to issue complaint and thereby place the issue before the Board.

SECTION 10(j) AUTHORIZATIONS

During the second calendar quarter of 1985 the Board authorized a total of 13 Section 10(j) proceedings. Most of these cases fell within factual patterns set forth in General Counsel Memoranda 79-77 and 84-7. As contemplated by those memoranda, these cases are described in the chart set forth below. For a fuller description of the case categories, the reader is directed to General Counsel Memoranda 79-77 and 84-7. However, one case was somewhat unusual, and therefore warrants special discussion.

In the case, the Region had issued a complaint which alleged that the Employer had illegally discharged the leader of a rival union's organizing drive in a plant which was represented by an incumbent union with a current labor agreement. The challenging union had filed a timely representation petition supported by the requisite showing of interest. The supporters of the rival union had struck to protest the discharge of their leader, and they were in turn unlawfully discharged, ostensibly for breaching the no-strike clause in the incumbent union's contract. The complaint alleged that the strikers had been engaged in a protected unfair labor practice strike. In our view, a subsequent arbitral award which upheld their discharge was not subject to deferral, because there was a conflict of interest between the strikers and the incumbent union.

We concluded that 10(j) relief was warranted to reinstate the strikers and their leader to the plant pending Board litigation. Absent interim relief, the Employer's conduct threatened to "nip in the bud" the rival union's timely organizing drive, and also constituted a substantial impediment to conducting a quick and fair election on the challenging union's representation petition. With interim reinstatement of the discriminatees and a broad cease and desist order, the core of the rival union's employee support could be preserved in the plant, and the laboratory conditions needed for a fair election could be quickly restore.

The district court granted complete relief in the case. On appeal to the circuit court of appeals, an emergency motions panel denied the Employer's request for a stay of the reinstatement order pending appeal. The Employer subsequently withdrew its appeal.

The 13 authorized cases fell into the following categories, as defined and described in General Counsel Memoranda 79-77 and 84-7:

Category	Number of Cases in Category	Results
1. Interference with organizational campaign (no majority)	2	Won one case; other case not litigated due to changed circumstances.
2. Inteference with organizational campaign (majority)	1	Case is pending.
3. Subcontracting or other change to avoid bargaining obligation	0	-------
4. Withdrawal of recognition from incumbent	2	Won one case; other case was settled before petition filed.
5. Undermining of bargaining representative	2	Both cases settled after petition filed.
6. Minority union recognition	0	-------
7. Successor refusal to recognize and bargain	1	Case settled after petition filed.
8. Conduct during bargaining negotiations	0	-------
9. Mass picketing and violence	2	Won one case; other case was settled after petition filed.
10. Notice requirements for strike or picketing	0	-------
11. Refusal to permit protected activity on property	0	-------
12. Union coercion to achieve unlawful object	0	-------
13. Inteference with access to Board processes	0	-------
14. Segregating assets	2	Won one case; other case not litigated due to changed circumstances.
15. Miscellaneous	1	Lost case.

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

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QUARTERLY REPORT OF THE GENERAL COUNSEL

This report covers cases decided during the third and fourth quarters of calendar year 1985. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I have sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

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EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

Employer Surveillance of Suspected Unlawful Activity

An interesting case arising during this period considered whether an employer could lawfully survey union representatives in their conversations with employees, where the employer suspected that the union was planning to engage in unlawful, secondary activity. The Employer was a general contractor engaged in construction at several jobsites. There were also subcontractors at these sites.

The Employer had a collective bargaining relationship with the Union. The instant case arose when negotiations for a new contract broke down. The Employer found some flyers on one of its jobsites. The flyers stated that, because of the dispute with the Employer, the Union was urging employees of subcontractors to honor its picket lines. There was no evidence establishing that Union representatives handed out the flyers.

Thereafter, a Union representative visited the jobsite and spoke with employees of subcontractors. When an Employer job superintendant approached them, the Union representative asked him to leave. The superintendent replied that he was there to listen to their conversation "because [the Employer] was trying to get an injunction against the Union." Ten days later, the Union representative again visited the site and spoke with employees of subcontractors. The Employer superintendant again approached and began taking notes and writing down the names of the employees involved in the conversations.

The Employer argued that it was privileged to ascertain whether the Union was unlawfully attempting to induce employees of the subcontractors to honor the Union's picket line. The Employer noted that, during the previous month, a complaint had issued alleging that related unions violated Section 8(b)(4)(B) by distributing a flyer similar to the flyer in the instant case, and by picketing at neutral entrances. Such conduct occurred at other sites where the Employer was working.

We decided that the mere potential for violations of the Act by the Union did not justify the Employer's infringement on the Section 7 rights of its employees.

In Villa Avila, 253 NLRB 76 (1980), enf. 673 F.2d 281 (9th Cir. 1982), the Board held that the respondent employers had violated Section 8(a)(1) by (1) denying the union access to speak with subcontractor employees at the jobsites; (2) threatening arrest of union representatives upon entering the jobsites; and (3) following union representatives and photographing them in the performance of their legitimate duties of serving the employees of

subcontractors. The employers contended that they were privileged to deny access to union officials because of evidence indicating that the union was engaging in picketing of secondary gates. Notwithstanding the existence of such evidence, the Board rejected the argument and found the violation. Similarly, in Blanchard Construction Co., 234 NLRB 1035 (1978), the Board found a Section 8(a)(1) violation where the employer photographed and tape recorded conversations between its own employees and their union representatives, notwithstanding the employer's contention that the surveillance was justified in order to obtain evidence that the union was interfering with work. Although the union earlier had engaged in harrassing activities, consisting of checking work cards of employees on an excessive number of occasions, the Board nevertheless found that the employer's conduct was unlawful. In the Board's view, the surveillance could be expected to have the natural effect of interfering with, coercing, and restraining employees in their interaction with their bargaining representative.

We decided that the Employer's actions here were similarly unlawful and not justified by the presence of flyers urging subcontractor employees to honor the Union's picket lines. First, as noted above, there was no evidence linking the Union to the flyers that were distributed at the jobsite. And, apart from the flyers, there was no evidence to establish that the Union engaged in or was planning to enage in unlawful secondary activity at that site. Second, although related labor organizations were found to have unlawfully used similar flyers at the other sites, there was no evidence indicating that the Union in our case condoned, authorized, or assisted these organizations in their activity.

We recognized that the Employer's surveillance activity was not as serious an infringement on employee rights as that found in Villa Avila. The employer there had engaged in a complete refusal of union access to the jobsite. Nevertheless, the Employer's conduct here did have a coercive effect on employees in exercising their Section 7 rights of conferring with their Union representatives.

EMPLOYER DISCRIMINATION

Rights of Economic Strikers

An interesting case decided during this period considered: (1) whether an employer violated Section 8(a)(1) by advising economic strikers that they would not be able to return to work if there were no job they were qualified to perform at the conclusion of the strike; and (2) whether nonstriking unit employees could lawfully be treated as permanent replacements for striking employees.

During an economic strike, the Employer sent a letter to all unit employees stating that it intended to begin hiring permanent replacements for the strikers. The letter concluded that:

> A permanent replacement hired to do your job will not be fired to permit you to return to work. You will not be able to use your seniority to bump your replacement, either.
>
> If there is a vacant job, you and other strikers will be considered for it, if qualified. If there is no vacant job you can do, you will not be able to return to work.

For the next four days, the Employer began to hire permanent replacements from outside the hospital. The Employer also offered to transfer nonstriking unit employees to jobs originally held by strikers. By the fourth day, a full complement of permanent replacements had been hired. This complement included five nonstrikers who opted to transfer to jobs held by strikers. At the end of the strike, the Employer continued the five transferred unit employees in the positions they had accepted during the strike, displacing strikers who offered to return to work. The Employer also retained the newly hired replacements.

We decided to issue complaint alleging that the Employer violated Section 8(a)(1) by advising strikers that, if there were no job they were qualified to perform at the conclusion of the strike, they would not be able to return to work. On the other hand, we also decided that the Employer could lawfully treat transferred nonstriking unit employees as permanent replacements for strikers.

1. The coercive statement

In Harrison Steel Castings Co., 262 NLRB 450 (1982), enfd. 728 F.2d 831 (7th Cir. 1984), the Board found a Section 8(a)(1) violation where an employer advised employees that:

> permanent replacements hired for strikers are allowed by law to keep the striker's job even after the strike ends. Thus, employees who go on strike and are replaced have no job to return to when the strike ends.

Id. at 457. The Board reasoned that the statement created an ambiguity that could lead employees reasonably to assume that they risked termination if they participated in an economic strike.

In our case, the employees could reasonably read the Employer's statement as meaning that, if there were no vacant job at the end of the strike, they could never return to their jobs with the Employer. Thus, as in Harrison Steel Castings Co., supra, the statement could lead employees reasonably to assume that they risked termination if they continued to participate in an economic strike. Accordingly, we decided to issue a Section 8(a)(1) complaint.

2. The transferred nonstrikers as permanent replacements

It is, of course, well settled that an employer may refuse to reinstate economic strikers at the end of an economic strike if the employer has hired permanent replacements for those strikers. The burden of establishing the defense of permanent replacement status rests upon the employer.

In the instant case, the Union did not quarrel with the proposition that the Employer could use nonstriking employees as striker replacements. However, the Union argued that there was no business justification for offering to permanently transfer these employees into the positions held by strikers. According to the Union, since these employees had jobs with the Employer to which they could return after a strike, there was no need to offer permanence as an inducement for transfer.

We rejected the argument. The Board has held that an employer need not show some special justification for offering permanent status to replacements. See decision in Belknap v. Hale, ___ U.S. ___, 113 LRRM 3057, 3062, n. 8 (1983). Accordingly, we decided that the Employer lawfully treated nonstriking unit employees as permanent replacements for striking employees. Thus, the Employer did not violate the Act by retaining these employees in strikers' former positions after the strike.

EMPLOYER REFUSAL TO BARGAIN

Obligations of Employer-Purchaser

In another case, we considered whether an employer should be considered a stock purchaser, rather than an assets purchaser, for the purpose of determining its bargaining obligations.

Corporation A had a collective bargaining relationship with the Union. In September 1981, Corporation B acquired 15 percent of the stock of Corporation A and the right to appoint one-third of Corporation A's Board of Directors. It also acquired an option to buy sufficient additional stock in Corporation A so as to give it a majority of the stock. Beginning in September 1981, Corporation B began to increase its stock holdings, so that, by February 1984, it owned 47 percent of the stock. However, it never achieved a majority stock interest in Corporation A and never achieved majority control of Corporation A's Board of Directors. In May 1985, Corporation B purchased Employer A's assets, and Corporation A was dissolved. Corporation B opted for an assets purchase, rather than a stock purchase, because of tax considerations.

In acquiring the enterprise, Corporation B continued it in essentially unchanged form, with the significant exception that the workforce also substantially changed. As a result, a majority of Corporation B's unit employees did not come from Corporation A's unit. However, the evidence tended to establish that Corporation B discriminated in its hiring and that, but for such discrimination, a majority of Corporation B's unit employees would have come from Corporation A. Thus, under established principles, Corporation B was a successor employer with a bargaining obligation. The issue presented to us was whether we should also argue, in the alternative, that Corporation B had a bargaining obligation even if the allegations of discriminatory hiring practices were ultimately found to be nonmeritorious. In this regard, the argument ran, if the employing entity remained the same, the employer would have a continuing bargaining obligation even if there were employee turnover. That is, where there is a change of employees, and no change of employers, the bargaining obligation continues. Mere turnover is not sufficient to privilege a withdrawal of recognition. See Laystrom Mfg. Co., 151 NLRB 1482 (1965). Thus, if Corporation B had simply purchased the stock of Corporation A, Corporation A would have remained the employing entity and would have remained obligated to bargain even if the employee complement underwent a substantial change.

We decided that we would not argue that the employing entity remained the same. In this regard, we noted that Corporation B never become a majority stockholder and never achieved majority representation on Corporation A's Board of Directors. Thus, prior to the purchase transaction, the employer was Corporation A. The purchase was an "arm's length" acquisition of assets, after which Corporation A ceased to exist and Corporation B became the owner of the enterprise. In these circumstances, there was no substantial basis for contending that the corporate entity remained the same. Thus, Corporation B is a new employer and its obligation to bargain is solely dependent upon whether majority status was achieved. Hence, that obligation is solely dependent upon the allegations of discriminatory hiring practices.

Obligation to Furnish Information Regarding Covert Investigations

In another interesting case we considered whether an employer was obligated to furnish a union with notes and reports compiled by a private investigator who was inquiring into alleged acts of misconduct by the employer's unit employees.

The Employer hired a private firm to conduct a covert investigation of alleged theft and other misconduct by unit employees. The firm's investigators posed as unit employees. During the course of the investigation, the investigators prepared daily handwritten notes of what they had seen and heard. The notes were given to supervisors of the investigating firm. These supervisors prepared reports, based on the notes, and gave them to the Employer. Based on the reports, the Employer discharged several employees. After the discharges, the Employer prepared affidavits that were signed by the investigating employees. The affidavits essentially tracked the daily handwritten notes.

The Union grieved the discharges and sought all of the aforementioned documents. The Employer provided the Union with the affidavits, but declined to supply the notes and reports. We concluded that the Employer was not required to supply the notes and reports.

In NLRB v. Acme Industrial Co., 385 U.S. 432 (1967), the Supreme Court held that an employer has a general duty to furnish relevant information which will allow the union to decide whether to process a grievance to arbitration. The test of relevancy is a "discovery-type" standard--whether there is probability that the desired information is relevant.

The Board, however, has recognized certain limitations on a union's right to obtain relevant information. In Anheuser-Busch, Inc., 237 NLRB 982 (1978), the Board held that an employer is not required to provide a union with statements of witnesses obtained during the course of the employer's investigation of employee misconduct. Witness statements, the Board said, involve "critical considerations" which do not apply to the types of information comtemplated in Acme. These considerations include the danger that premature release would give employers and unions an opportunity to coerce and intimidate witnesses in an effort to make them change their testimony. In addition, if the rule were that such statements are releasable, witnesses would be relucant to give statements and a vital source of information would be lost.

In our view, the notes and reports were analogous to the witness statements in Anheuser-Busch, and hence were privileged from disclosure. The Union argued that Anheuser-Busch was distinguishable because the notes and reports in our case were prepared by professional investigating agents employed by a third party. According to the Union, these agents, unlike employees of the Employer and members of the Union, would not likely be subject to Employer or Union pressure. Further, the Union contended, the dangers of premature disclosure, expressed in Anheuser-Busch, would not apply to such persons. In this latter regard, the Union argued that professional agents would not be chilled in connection with the functions of observation, note taking, and report writing because those tasks are part and parcel of their professional tasks and responsibilities.

We rejected the arguments for the following reasons. The Board in Anheuser-Busch made it clear that it was not confining its holding to witness statements given by employees. Citing the Supreme Court in NLRB v. Robbins Tire and Rubber Company, 98 S. Ct. 2311 (1978), the Board said that premature disclosure raises the risk that employers or unions "will coerce or intimidate employees and others who have given statements . . ." (emphasis added). The Board went on to say that "in any event, without regard to the particular facts of this case, . . . the 'general obligation' to honor requests for information . . . does not encompass the duty to furnish witness statements themselves." (emphasis added). Thus, the Board's concerns were not confined to the situation where employees or Union members were witnesses, and the Board did not intend to confine its view to the particular facts of Anheuser-Busch. Accordingly, we applied Anheuser-Busch and declined to require that the notes and reports be furnished.

Finally, we noted that the Union was given the affidavits. From these documents, the Union could glean the nature of the case against the employees, and the Union would know the names of potential witnesses. See Transport of New Jersey, 233 NLRB 694 (1977).

Bargaining Proposals As Indicia of
Bad Faith Bargaining

In one case we decided to request that the Board reconsider certain of its holdings. Reichhold Chemical, 277 NLRB No. 73 (November 22, 1985).

First, we requested that the Board reconsider its holding that it would not evaluate the reasonableness or content of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether that party had bargained in good faith. In reaching its conclusion in Reichhold, the Board relied primarily on its earlier decision in Rescar, Inc., 277 NLRB No. 1, which, in turn, referred to the summary of legal principles in Atlanta Hilton, 271 NLRB 1600 (1984). However, Atlanta Hilton had included "unreasonable bargaining demands" among the kinds of conduct which would be considered indicative of bad faith bargaining. Thus, we believe that, by the Board's own citation, the reasonableness of a party's bargaining proposals can be a factor to be considered in deciding whether that party bargained in good faith. Further, Reichhold constituted a departure from a longstanding practice under which the Board, with the approval of reviewing courts, consistently has examined the positions taken by a party in collective bargaining to determine whether the party was honestly seeking an agreement. Stuart Radiator Core Mfg. Co., 173 NLRB 125 (1968); Chevron Chemical Co., 261 NLRB 44, 46 n. 10 (1982); A-1 King Size Sandwiches, Inc. v. NLRB, ___ U.S. ___, 105 S. Ct. 508, 117 LRRM 3080 (1984); Reed & Prince Mfg. Co., 346 U.S. 887 (1953).

We decided to seek reconsideration of Reichhold in another respect as well. In Reichhold, the Board held that the Employer could insist to impasse on a clause prohibiting all strikes during the life of the contract, including strikes to protest unfair labor practices. The clause also provided that employees who were disciplined for engaging in an unfair labor practice strike, in breach of the clause, waived their rights to file charges with the Board to protest such discipline. We decided to seek reconsideration of the Board's holding that the Employer could lawfully insist on a clause that prevented access to the Board. Concededly, an employee who is disciplined for striking in breach of a no-strike clause may not have a meritorious case before the Board. However, there can be instances of meritorious charges even under a no-strike clause, as where, for example, a striking employee receives disparate discipline because of prior protected activities. Although the clause in Reichhold precluded only charges based on discipline for striking, there is a legitimate concern that employees who are disparately disciplined for other activity may not fully appreciate the distinction and would be discouraged from filing a charge. Thus, in our view, the Employer's proposal, if agreed to, would clearly impinge upon the Board's paramount interest in maintaining unimpeded access to its processes. In addition, the clause would discourage employees from resorting to the Board on all kinds of potential charges. Thus, we decided to seek reconsideration of the Board's holding that the Employer could lawfully insist to impasse on this aspect of the clause.

Unilateral Implementation of Proposal
Abrogating Statutory Rights

In one case, we considered whether an employer could implement a bargaining proposal, after impasse, where the proposal effectively waived the union's statutory right to select its own bargaining representatives.

The parties last agreement contained a grievance and arbitration clause which provided for a four-step procedure. The first step occurred between the aggrieved employee and the foreman, with or without Union representation; the second step was between the "Employer's Representative and the Union Committee" (the latter not further defined as to its members); the third, an appeal by the Union to higher officials of the Employer; and the fourth, an arbitration board. The parties' consistent practice was that, at the second step, the Employer met with the local Union officers, and at the third step, the Employer met with the International Representative.

The contract expired and the parties bargained to impasse. The Employer implemented its last proposal which, among other things, eliminated the third grievance step. Several months later, the Union informed the Employer that the International Representative would serve as chairman of the "Union committee" that met at the second step. The Employer protested and refused to discuss pending grievances with the International Representative who appeared at a second-step grievance meeting as chairman of the Union's grievance committee.

We decided that the Employer could lawfully implement, after impasse, its proposal to compress the grievance procedure so as to eliminate the third step and retain the second step. The Employer argued that this is precisely what it did, and that the Union unilaterally altered the second step.

We rejected the Employer's argument. The fact that the Employer could implement a three-step procedure does not mean that the Employer could dictate to the Union who would represent it on the "Union Committee" at the second step. It is well settled that a Union has a statutory right to select its own bargaining representatives unless the presence of such individuals would create a clear and present danger to the collective-bargaining process. That exception had no application to our case. See Fitzsimons Manufacturing Co., 251 NLRB 375 (1980). Hence, the Union had a right to choose its own representative at step two. We recognized that the International Representative was not the representative at the "old" step two. Thus, in a sense, the Union unilaterally changed its step two representative. However, the aforementioned statutory right meant that the Union could change its representative at any time. Accordingly, the Employer could not refuse to bargain with the International representative at the third step absent mutual agreement.

UNION REFUSAL TO BARGAIN

Union Violence as Bad Faith Bargaining

In one unusual case, we considered whether the conduct of union officials who physically attacked a supervisor of the employer and later disrupted an employer social function constituted bad faith bargaining in violation of Section 8(b)(3).

One of the Employer's supervisors had been accused of engaging in violent acts against employees. State criminal proceedings were instituted with the result that the supervisor and one employee were placed on one year's probation. Thereafter, three Union officials went to the Employer's facility and allegedly physically assaulted the supervisor. During the assault, one official allegedly stated that he would kill the supervisor and anybody else who gave "their boys a hard time." Later, one of the Union officials decided to attend an Employer party being held that same evening. Representatives of the Employer were at the party. The Union official accompanied by about 20 persons went to the party, even though none was invited. At the party, the uninvited individuals were intimidating toward the guests, made racist remarks, offered to fight with a member of management, threatened to "bust heads," and stated that it was necessary to make a "show of force."

We decided that the beating of the supervisor and the disruption of the party were part of an effort to intimidate representatives of the Employer and to achieve Union objectives through such intimidation. We also concluded that such conduct was inconsistent with the obligation to bargain in good faith.

In Laura Modes Company, 144 NLRB 1592, 1596 (1963) the Board refused to grant a bargaining order, otherwise warranted by the employer's conduct, because of the union's resort to violent tactics. In Nacional de Trabajadores, 219 NLRB 862 (1975), the Board noted that the beating of a supervisor by union agents was the latest in a series of violent acts by such agents. Since the union had "corrupted and frustrated the representative scheme of bargaining envisaged by the Act," the Board revoked the union's certification. In Fitzsimons Manufacturing Company, 251 NLRB 375 (1980), the employer, following a physical confrontation between a union representative and an employer official, demanded that the union remove that official as its representative. The union did not honor this request, and the employer refused to meet with the official. In the Section 8(a)(5) case that followed, the Board found the union official's conduct was sufficiently egregious to make bargaining impossible. Thus, the employer's refusal to meet with him did not violate Section 8(a)(5).

In view of these cases, it is clear that union violence can constitute a defense to Section 8(a)(5) charges resulting from an employer refusal to meet with the Union. However, in our case, the Employer wanted to continue collective bargaining; it simply wanted a halt to the Union's misconduct. We noted that the results reached in the cited cases were based on findings that the conduct made "collective bargaining impossible or futile." Fitzsimons, supra at page 379. In view of the similarity of the conduct in our case, we decided to issue complaint on the view that violent conduct which makes good faith bargaining impossible constitutes a breach of the duty to bargain in good faith.

In considering an appropriate remedy for this violation, we recognized that permanent disqualification of these officials from representing the Union in its dealing with this Employer might be inappropriate in view of the Board's general view that violations can be cured after reassurances of nonrecurrence and the passing of a determined period of time (typically measured by the time a notice is required to be posted). Therefore, we decided to seek an order requiring the Union to bargain in good faith without the presence of the three officials for the 60 days during which an appropriate Section 8(b)(3) notice would be posted.

HOT CARGO CLAUSES

"Anti-Dual Shop" Clauses

In one very important case, we dealt with the issue of whether an "anti-dual shop" shop clause violated Section 8(e) of the Act. We concluded that the clause was unlawful under Section 8(e) and that union pressure to secure such a clause therefore violated Section 8(b)(4)(A).

The hallmark of a Section 8(e) clause is that it is a secondary clause, i.e. a clause that is addressed to the labor relations of another employer. Thus, the first issue was whether the "anti-dual shop" clause imposed the contract on a separate employer. The clause in our case was worded broadly. Under the clause, if the unionized employer, through its officers, directors, partners, owners, or stockholders, exercised management or control over the firm or had majority ownership in the other firm, the contract would apply. Further, even if family members were the ones who managed, controlled or had ownership in the other firm, the contract would apply to the other firm.

The issue was whether, under this language, the clause would be triggered in situations where the signatory employer and the other entity were separate employers. In determining whether two entitites constitute a single employer or separate employers, the Board and the courts consider four relevant factors: interrelation of operations, common management, centralized control of labor relations and common ownership. It is clear that a single employer relationship can be established even if one of the factors is missing. But no case suggests that a single employer relationship is established if only one of the factors is present.

Applying these principals to our case, we noted particularly that the clause was worded in the disjunctive. It operated even if common management alone existed, or even if common control alone existed, or even if majority ownership alone existed. It was therefore clear that the clause was broad enough to embrace situations where a single employer relationship did not exist. In sum, because of the breadth of the clause, it was apparent that the clause could operate to impose the union on a separate employer. The clause could therefore affect the labor relations of that separate employer, and was thus a secondary clause.

The next issue was whether the "anti-dual shop" clause fit the language of Section 8(e). In order to establish that a clause violates Section 8(e), it is necessary to show that there is a "doing of business" between the signatory employer and some other employer, and that the clause would operate to cause an impairment of that business relationship. In the context of an "anti-dual shop" clause, it is therefore necessary to establish, at the outset, that the signatory employer (the unionized employer) "does business" with the other firm. It is clear that there can be situations where there are some business ties between the unionized employer and the other firm, and yet the two firms do not constitute a single employer. For example, common control of labor relations is a hallmark of a single employer. A unionized firm can have

financial ties to the other firm, or the unionized firm can furnish equipment or services to the other firm, and yet the other firm could have independent and autonomous control over its own labor relations. Thus, the two firms would be separate employers who "do business" with each other. Since the clause in our case was broad enough to cover these situations, the clause affected the "doing of business" between two firms.

The next issue was whether the clause would cause the unionized employer to "cease doing business" with the other firm. The law is clear that a clause which impairs a business relationship can be violative of Section 8(e), even if it does not wholly break the business relationship. Operating Engineers, Local 825 (Burns & Roe, Inc.), 400 U.S. 297 (1971). Accordingly, if a unionized employer can be said to "do business" with the other firm, it is clear that the "anti-dual shop" clause would operate to impair that relationship. In essence, the unionized employer must sever all ties to the other firm, lest that firm be forced to swallow the union contract. In this sense, the clause is similar to the classically secondary union-signatory clause, i.e. a clause that tells a general contractor to require its subcontractor to sign the contract or not do business with that subcontractor. Based on the above, we concluded that the unionized employer "does business" with the other firm and that the "anti-dual shop" impairs that business relationship. Thus, the clause was within the ambit of Section 8(e).

The next issue was whether the clause was protected by the proviso to Section 8(e). In this regard, we noted that the clause arose in the construction industry, and thus there was an issue as to whether the construction industry proviso saved the clause. Under a plain reading of the proviso, the clause would not be protected. the proviso protects clauses that relate "to the contracting or subcontracting" of jobsite work. Thus, for example, the proviso would apply to a union-signatory clause, i.e., a clause that requires the general contractor to subcontract only to those employers who will adhere to the union contract. However, the "anti-dual shop" clause did not deal with the unionized employer's contracting or subcontracting. It dealt with the unionized employer's financial or other ties to a related firm. Thus, the proviso did not apply.

In our view, the Board's decision in The Carvel Co., 152 NLRB 1672 (1965), was not to the contrary. In that case, the clause forbade the signatory employer from working on sites where any employer was nonunion. Thus, the clause did not relate to the signatory employer's contracting or subcontracting of work to another person. Notwithstanding this, the Board held that the clause was protected by the proviso. However, we noted that the Carvel clause was at least related to the contracting of work. It told the signatory employer that it could not contract at nonunion sites. By contrast, our clause did not tell the signatory employer where it could or could not work. It told the signatory employer whether it could or could not invest in another firm.

We further concluded that Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982), was distinguishable. The clause in Woelke & Romero was a typical union-signatory subcontracting clause, i.e., a clause relating to the "contracting or subcontracting" of work. As discussed above, our clause was

wholly different. Moreover, the Supreme Court in Woelke & Romero noted that the proviso was designed to protect those clausesthat were part of the "pattern of collective bargaining" in 1959, when the proviso was passed. The type of clause involved in Woelke & Romero was prevalent in 1959. However, "anti-dual shop" clauses were not prevalent in 1959, and thus they are not protected by the proviso.

Finally, we concluded that the union violated Section 8(b)(3) by seeking such a clause. Under well-established principles of Section 8(b)(3), a union cannot insist, in bargaining for one unit, on a clause that relates to another unit. The "anti-dual shop" clause did not relate to the unionized employer's unit. It related to a separate unit. Hence, the union could not insist on it.

We recognized that the Board has held that if a clause is expressly sanctioned by the Section 8(e) proviso, it would be anomalous to conclude that Congress intended Section 8(b)(3) to forbid a union from seeking it. E.L. Boggs Plastering Co., 150 NLRB 158, 165 (1964). However, as set forth above, the clause in our case was unlawful under Section 8(e). Thus, there was a violation under "normal" principles of Section 8(b)(3).

PROCEDURE IN UNFAIR LABOR PRACTICES CASES

Mutually Inconsistent Charges
Involving Credibility Dispute

Another interesting case involved mutually inconsistent allegations of Section 8(b)(7)(C) and Section 8(a)(5), where the determination of which party's conduct was unlawful depended on the resolution of a credibility dispute.

On February 25, the Union began picketing the Employer's facility with signs that identified the Union and the Employer, and stated "No Contract, On Strike." On March 5, the parties met. According to the Employer, the Union stated that the picketing would cease when the Employer signed a contract. The parties met on two subsequent occasions to discuss a contract. The Employer maintained that at no time during any of these meetings did it extend recognition to the Union, nor did the Union offer to demonstrate majority status. In contrast, the Union alleged that at the March 5 meeting, it offered to demonstrate its majority status but the Employer's attorney declined and stated, "we're past that, let's see what we need to conclude an agreement." Also according to the Union, at the parties' last meeting, agreement had been reached on every contract issue with the exception of one clause. Thereafter, however, the Employer declined to meet further.

In our view, if the Employer's version of the facts were credited, there was a violation of Section 8(b)(7)(C) and no violation of Section 8(a)(5). That is, the Union was picketing to obtain recognition, and such recognition had not been extended. On the other hand, if the Union's version of the facts were credited and interpreted favorably to the Union, there would be no violation of Section 8(b)(7)(C) because the Union became the representative before the picketing had continued for an unreasonable period. And, under these facts, the refusal to bargain further would be unlawful under Section 8(a)(5).

Although matters of this kind, where the merit of cross-filed charges depend upon the resolution of a credibility conflict, can be handled in a variety of ways, we decided that, in the circumstances present in this case, we would litigate the Section 8(b)(7) case and hold in abeyance the Section 8(a)(5) case. In this regard, we noted that the former case was a statutory priority case and the latter case was not. Second, the Employer's version of the facts, if credited, would establish a Section 8(b)(7)(C) violation. On the other hand, the Union's version of the facts, if credited, would not necessarily establish a Section 8(a)(5) violation. In this regard, it is possible that the Employer's statement "we're past that, let's see what we need to conclude an agreement", could be found to be ambiguous. The Employer could have meant that it was

granting recognition to the Union. Alternatively, it could have meant that the Employer was prepared to concede that the Union had majority status, but would not grant recognition unless and until the parties reached a satisfactory agreement. That condition was never met.

For the foregoing reasons, we decided to litigate the Section 8(b)(7) case and to hold the Section 8(a)(5) case in abeyance.

SECTION 10(j) AUTHORIZATIONS

During the third and fourth calender quarters of 1985 the Board authorized a total of 20 Section 10(j) proceedings. Most of these cases fell within factual patterns set forth in General Counsel Memoranda 79-77 and 84-7. As contemplated by those memoranda, these cases are described in the chart set forth below. For a fuller description of the case categories, the reader is directed to General Counsel Memoranda 79-77 and 84-7. However, three cases were somewhat unusual, and therefore warrant special discussion.

In the first case, the Region had issued a Section 8(a)(5) complaint against the Employer, who was engaged in the business of warehousing and delivering food products and utensils for fast food restaurants and airlines. The Employer owned its own trailers and rented its delivery tractor-trucks. It also contracted with another company for the services of truck drivers on a cost-plus basis. The drivers of the service company were represented by the Union, and the labor agreement was soon to expire. The evidence indicated that the Employer exercised sufficient day-to-day control over the service company's drivers to be deemed a joint employer with it. When the Employer notified the service company that it was considering cancelling its service contract if labor costs were not reduced, the Union sought direct bargaining with the Employer over the terms of a new labor agreement for the drivers. The Employer refused to bargain, claiming that it was not a joint employer of the drivers. The Employer then cancelled its commercial contract with the service company, which resulted in the layoff of the drivers. The Employer then contracted for drivers from another company.

Based on these facts, we concluded that the Employer had unlawfully refused to bargain with the Union about the decision to cancel the commercial contract with the service company. Given the proposition that the Employer and the service company constituted a joint employer, the decision was essentially a decision to subcontract the unit driving work, which decision turned on labor costs. Thus, the Employer was required to bargain about it.

We further concluded that 10(j) relief was warranted to compel the Employer to restore its previous driving operation, reinstate the laid-off drivers, and recognize and bargain with the Union over the terms of a new labor agreement. In our view, absent an interim injunction to quickly restore the status quo ante, the passage of time would freeze the situation and make it difficult to obtain a Board and court order undoing that which would have been in place for a long time.

The Employer settled this case before the 10(j) petition was filed.

In the second case, the Region had issued a Section 8(a)(1), (3) and (5) complaint against the Employer, which was engaged in the business of operating a nursing home. The Employer had recently entered into its first labor contract with the Union. The contract contained a grievance-arbitration procedure. Thereafter, the Employer began a campaign of threats and harassment against Union supporters. The Employer also unilaterally and discriminatorily implemented more onerous working conditions with respect to those portions of the unit that had the most support for the Union. As a result of the changes in working conditions, some nine employees quit their jobs under circumstances that led us to conclude that they were constructive dischargees.

The Employer argued that the allegations in the complaint should be deferred to the parties' contractual grievance procedures, and that 10(j) relief was therefore unwarranted.

We concluded that deferral to the parties' grievance procedures was inappropriate, and that 10(j) proceedings were warranted. In view of the extent and severity of the Employer's conduct, and in light of the fact that the Union was a fledgling representative, we feared that the Union's status would be irreparably dissipated during the time required for completion of arbitration. Accordingly, we decided that we would not defer to arbitration and that we would seek injunctive relief pending the completion of litigation before the Board.

After the 10(j) petition was filed, the Employer settled the case.

In the third case, the Employer and the Union were involved in a bitter economic dispute over the terms of a new labor agreement. The Union had been on strike for some six weeks, and the Employer had begun to hire strike replacements. The Employer also hired a security company to provide guard service for the plant. Thereafter, agents of the security company, the Employer and the Union engaged in misconduct such as threats of bodily injury, physical assaults, property damage, brandishing of dangerous weapons, and mass picketing. The Region had issued a Section 8(b)(1)(A) complaint against the Union and Section 8(a)(1) complaints against the Employer and Security Company.

We concluded that 10(j) proceedings were warranted against <u>all</u> respondents to enjoin the violence and other misconduct that restrained and coerced the Section 7 rights of both the nonstriking and striking employees of the Employer. The evidence indicated that local police authorities were not controlling the situation, and a state court order had proven to be ineffective.

The Employer and security company entered into consent 10(j) decrees before the district court; the court granted our requested relief against the Union.

The 20 authorized cases fell into the following categories, as defined and described in General Counsel Memoranda 79-77 and 84-7:

Category	Number of Cases in Category	Results
1. Interference with organizational campaign (no majority)	1	Case settled after petition filed.
2. Interference with organizational campaign (majority)	5	Won one case; two cases settled before petition filed; one case settled after petition filed; lost one case in substantial part.

3.	Subcontracting or other change to avoid bargaining obligation	1	Case settled before petition filed.
4.	Withdrawal of recognition from incumbent	1	Case settled before petition filed.
5.	Undermining of bargaining representative	4	Won one case; two cases settled after petition filed; lost one case in substantial part.
6.	Minority union recognition	0	---
7.	Successor refusal to recognize and bargain	1	Lost case in substantial part.
8.	Conduct during bargaining negotiations	0	---
9.	Mass picketing and violence	1	Won case.
10.	Notice requirements for strike or picketing	2	Cases not litigated as misconduct ceased.
11.	Refusal to permit protected activity on property	0	---
12.	Union coercion to achieve unlawful object	0	---
13.	Interference with access to Board processes	0	---
14.	Segregating assets	3	Won one case; one case settled after petition filed; one case not litigated due to changed circumstances.
15.	Miscellaneous	1	Won case.

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR RELEASE
FRIDAY, 16 MAY 1986

(R-1769)
202/632-4950

ROY H. GARNER NAMED NLRB REGIONAL DIRECTOR IN PHOENIX, ARIZONA

The appointment of Roy H. Garner, 53, as Regional Director for the National Labor Relations Board in its Region 28 Office in Phoenix, Arizona, was announced today by Chairman Donald L. Dotson and General Counsel Rosemary M. Collyer.

A career NLRB employee with 24 years of service in the Phoenix Regional Office, Garner succeeds Milo V. Price, who retired in January. Garner had been Assistant to the Regional Director in the Phoenix Office since 1973.

The jurisdiction of Region 28 includes Arizona, New Mexico, and the three westernmost counties of Texas. In addition to the Phoenix Regional Office, Garner will also supervise Resident Offices in Albuquerque, New Mexico, and El Paso, Texas. He will direct a staff of about 32 professional and clerical employees.

The NLRB administers and enforces the National Labor Relations Act. It conducts secret ballot elections to determine whether employees desire union representation, and it investigates and remedies unfair labor practice charges.

A native of Genoa, Colorado, Garner joined the NLRB in 1962 as a field examiner. Following a fine record of achievement as a field examiner, including the receipt of two awards, he was promoted to Assistant to the Regional Director in 1973. In that position, Garner also was cited on a number of occasions for his outstanding performance.

Garner is a veteran of the Korean conflict, having served in the Army as a paratrooper from 1951 to 1955. Thereafter, while employed in private industry, he attended Arizona State University, graduating in 1962 with a Bachelor of Science degree.

Garner resides in Phoenix with his wife Ruby. They have three grown children, Roy, Jr., Robin and Rebecca.

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Friday, 23 May 1986

(R-1770)
Tel: 202/632-4950

ALVIN P. BLYER NAMED NLRB REGIONAL DIRECTOR IN BROOKLYN

The appointment of Alvin Paul Blyer, 41, as Regional Director for the National Labor Relations Board in its Region 29 office in Brooklyn, N.Y., was announced today by Chairman Donald L. Dotson and General Counsel Rosemary M. Collyer.

A career NLRB attorney with 15 years of service in the New York City area, Blyer succeeds Samuel M. Kaynard, who retired in January. Blyer had been serving as Regional Attorney in the NLRB's Manhattan office, Region 2, since 1980.

As Regional Director in Brooklyn, Blyer will supervise NLRB casehandling activities in Queens, Kings, Suffolk, Nassau, and Richmond counties. He will direct a staff of about 45 professional and clerical employees.

The NLRB administers and enforces the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees desire union representation, and it investigates and remedies unfair labor practice charges.

A native of Brooklyn, Blyer joined the NLRB in 1971 as a Field Attorney in the Brooklyn office. Following two awards and promotion to Trial Specialist, he was transferred to the Manhattan office as Deputy Regional Attorney in 1979. The following year he was promoted again to Regional Attorney.

Blyer attended Queens College and received his BA degree cum laude at Brooklyn College in 1966. He was awarded his law degree from George Washington University in 1969. In law school, he was on the law review and a member of the Order of the Coif. From 1969 to 1971, he taught social studies at a junior high school in Brooklyn.

Blyer resides in his hometown with his wife Linda, and two children, Raina, 9, and Jonathan, 4.

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

Post New Release Procedure

FOR RELEASE IN AM PAPERS
Tuesday, 1 July 1986

(R-1773)
202/632-4950

NLRB GENERAL COUNSEL ISSUES REPORT ON FY 1985 OPERATIONS

Each year the National Labor Relations Board's Office of the General Counsel issues an overview of its operations. The Summary of Operations covering fiscal 1985 is attached.

SUMMARY OF OPERATIONS

FISCAL YEAR 1985

INTRODUCTION

This Summary is a continuation of the General Counsel's practice of providing an annual overview of the operations of the Office of the General Counsel. In addition, inasmuch as the 50th anniversary of the National Labor Relations Board was celebrated in 1985, it seems appropriate to assess the effectiveness of the Office of the General Counsel in carrying out its statutory mission not only for Fiscal Year 1985, but also, to the extent possible, for the last 25 years. I have selected 25 years because our recordkeeping in most areas of performance in the earlier years is either not available or not kept in the format that we have used during the past 25 years.

The record of performance achieved by the staffs of the Headquarters and Regional Offices of the Office of the General Counsel in Fiscal Year 1985 was outstanding. It reflects again the commitment of those staffs and of those who practice before us to an effective and efficient administration of the Act.

It is a record with which I am proud to be associated.

Rosemary M. Collyer
General Counsel

THE NATIONAL LABOR RELATIONS ACT

Any assessment of the operations of the General Counsel must necessarily be made in the context of the overall mission of the Agency and the role assigned to the General Counsel in the administration of the Act.

The National Labor Relations Act was enacted in 1935 and amended in major respects in 1947 and 1959. The broad policies of the Act seek to protect the rights of workers to self-organize, to form, join, or assist labor organizations, to designate representatives of their own choosing for purposes of collective bargaining and to protect the rights of workers to refrain from such activities. By protecting these employee rights, the statute seeks to reduce interruptions in commerce caused by industrial strife. The Agency achieves this end through its statutory assignment of: (1) determining and implementing, through secret ballot elections, the free choice by employees as to whether or not they wish to be represented by a union in dealing with their employers and, if so, by which union and (2) preventing and remedying unfair labor practices by either employers or unions or both.

The Act separates the statute's prosecutory and adjudicatory functions by providing for an independent General Counsel who is appointed by the President and subject to Senate confirmation. The General Counsel serves for a 4-year term and acts as the statute's prosecutor with responsibility for the overall supervision of the Agency's 33 Regional Offices. In this prosecutorial role, the General Counsel presents unfair labor practice issues to the five-member Board in administrative proceedings. The General Counsel also represents the five-member Board before the U.S. Courts of Appeals and the Supreme Court.

The authority to handle representation matters rests with the Board which has, in turn, delegated the initial authority to handle representation cases to the Regional Directors. Thus, the Regional Directors have authority to investigate representation petitions, determine appropriate units of employees for collective bargaining, conduct elections and determine whether objections to conduct of elections are valid. The statute provides for appeal of representation questions to the Board.

ORGANIZATION OF THE OFFICE OF THE GENERAL COUNSEL

The Office of the General Counsel is composed of five major components or Divisions. These Divisions are responsible for the various casehandling, administrative and personnel functions of the Office. The five Divisions are: The Division of Operations-Management and Regional Offices, the Division of Advice, the Division of Enforcement Litigation, the Division of Administration, and the Office of Equal Employment Opportunity.

The Division of Operations-Management includes Headquarters and Regional Office staffs. The Headquarters staff has responsibility on behalf of the General Counsel for the operations of the Regional, Subregional and Resident Offices, and the coordination of the casehandling of these offices with the Washington divisions of the Office of the General Counsel and the Board.

There are 33 Regional Offices, 3 Subregional Offices and 16 Resident Offices. Each Regional Office is headed by a Regional Director who is responsible for the management of the office and any attached Subregional or Resident Offices and for the investigation and initial determination of the merits of unfair labor practice cases and representation cases. The Regional Director is also

responsible for processing requests for information under the Freedom of Information Act and applications for fees under the Equal Access to Justice Act.

The Division of Advice has the function of rendering substantive legal advice to the General Counsel and to Regional Offices in cases which involve novel or complex issues, cases of national interest or cases which involve developing and changing areas of the law. The Division also processes requests for injunctive relief under Section 10(j) of the Act, litigates injunction cases in Federal appellate courts under Section 10(l) and 10(j), and indexes and classifies Board and court decisions under the Act.

The Division of Enforcement Litigation is responsible for the Agency's litigation in the United States Court of Appeals, the Supreme Court of the United States, and for contempt and miscellaneous litigation in Federal and State courts to protect the Agency's processes and functions. The Office of Appeals is a major component of the Division of Enforcement Litigation. This office reviews appeals from Regional Directors' refusals to issue complaint in unfair labor practice cases and recommends action to be taken thereon by the General Counsel. It also processes appeals from the Regional Directors' denials of FOIA requests.

The Division of Administration is under the supervision of the General Counsel and has been delegated responsibility for the development, direction and coordination of administrative staff support functions for both the Board and the General Counsel.

The Office of Equal Employment Opportunity is under the direction of the Board and the General Counsel and is responsible for the development, monitoring and

evaluation of the Agency's affirmative action program and the processing of internal complaints of discrimination.

PERFORMANCE: FY 1960 - FY 1985 1/

The data maintained by the Office of the General Counsel as a means of measuring the efficiency and productivity of its various divisions reveal that, overall, the Office of the General Counsel has shown steady increases in efficiency and effectiveness over the past 25 years. In particular, in the area of case processing, the case management system has produced the results it was designed to achieve and has served to bring about a more speedy resolution of unfair labor practice and representation issues. Thus, for example, the Regions' effectiveness in obtaining settlement agreements has improved steadily and significantly from a settlement rate of 75 percent in FY 1960 to the current 94.4 percent rate. This improved effectiveness is also demonstrated by the steady increase in the election agreement rate from a 76.4 percent rate in FY 1965 to the current rate of 81.5 percent. Other significant trends include the reduction in the median for time to issue complaint in meritorious cases from 59 days in FY 1971 to the current 44 day median.

During Fiscal Year 1985, the performance of the entire Office of the General Counsel in many areas met or exceeded the best performance of prior years. Of course, in absolute numbers, some areas were affected by the downward trend in case intake of recent years; the lowered case intake of FY 1985 at 40,290 (compared to a record high of 57,381 in FY 1980) resulted in a decrease in the number of elections held, the number of election agreements reached, and the number of complaints issued. Because of this decreased caseload, staffing in

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1/ The statistics for Fiscal Year 1985 are preliminary figures.

the Office of the General Counsel has also been decreased through attrition. Other areas of performance were unaffected by the reduced case intake, including the 94.4 percent settlement rate and the 81.5 percent election agreement rate. These are some of the highest settlement and election agreement rates ever obtained. A record $62,223,746 of backpay was distributed which exceeded the previous record of $48,707,609 distributed in FY 1983. A low of 44 median days to issue unfair labor practice complaints was attained which equaled the lowest median time ever obtained previously. Fiscal Year 1985 also saw a record 89.4 percent litigation success rate of cases won in whole or in part in the United States Circuit Courts of Appeals.

The summary of performance of the Office of the General Counsel in specific areas is set forth below.

Regional Offices

Case Intake

The NLRB has no authority to initiate proceedings on its own. Its processes must be invoked by the filing of a charge or a representation petition by a member of the public. Total case intake during FY 1985 was 40,290 compared to a total case intake of 44,186 in the previous year, representing an 8.8 percent decrease in intake. Unfair labor practice case intake at 32,064, decreased by 9.9 percent while representation case intake at 7,648, decreased by 2.6 percent below the previous year. In other types of cases filed (UD, AC and UC) there was also a decrease over the previous year's intake with the filing of 578 such cases as compared to 735 cases the previous year. This decrease in case intake is the continuation of the downward trend in case intake which the Agency has experienced since Fiscal Year 1980 (10/1/79 - 9/30/80). A review of intake

since FY 1960 reveals that, prior to FY 1980, there had been a steady rise of case intake.

Regional Professional Staff and Productivity

The average professional staff to handle the workload in FY 1985 was 1,095 compared to 1,154 in FY 1984, a decrease of 5.1 percent. This decrease in employment levels is the result of attrition and is part of management's efforts to maintain staff levels consistent with the levels of case intake. One unfortunate consequence of this attrition has been some staffing imbalances among the Regions and within some Regional Offices which we are now addressing. These imbalances have had, to some degree, a negative impact on the efficiencies of the operation. A review of the average professional staff since fiscal 1965 (figures are not available for FY 1960) reveals that in FY 1965 the professional staff numbered 820. In FY 1970 it had risen to 868. In FY 1975 the figure was 1,002 and in FY 1980 the average number of professionals was 1,242. In the area of productivity [the measure of average monthly output per regional professional during the year], the FY 1985 output per field professional per month decreased from 133.5 units in FY 1984 to 124.5 units, a decrease of 6.7 percent. A review of regional productivity in 5-year intervals reveals that in FY 1975, the first year for which figures are available using the current methods of computing productivity, the productivity figure was 142.0. In FY 1980, the figure was 156.8. The productivity figure is affected by a number of factors including case intake, average professional staff, attrition and the settlement rate. Thus, for example, while the professional staff has decreased by 5.1 percent below the previous year, the case intake has decreased by a greater rate (8.8 percent) resulting in staff members handling fewer cases per person. When this

fact is combined with continued high settlement and election agreement rates, it is not surprising that "statistical" productivity has shown a decline.

Information Officer Inquiries

The General Counsel's Public Information Program continued to render assistance to members of the public by referring them to the appropriate agencies or organizations or to assist them in filing charges with the NLRB, where appropriate. In FY 1985, the total number of inquiries received through the Public Information Program was 196,400, a decrease of 3.6 percent from the 203,815 inquiries received during FY 1984 and a 9.6 percent decrease from the 217,293 inquiries received during FY 1983. The rate of charge acceptance (percent of instances in which the contact results in a charge being filed) was 6.2 percent compared to percentages of 6.5 and 6.7, respectively, for FY 1984 and FY 1983.

A review of the Public Information Program from FY 1980, the first year that statistics were kept in the present format, indicates that there was an increase in inquiries from the public each year until FY 1984. Thus, in FY 1980, 129,037 inquiries were made. (This figure is based on 11 months since the Regions began their record keeping in the present format in November 1979). In FY 1981 the figure was 197,421 and in FY 1982 the figure had risen to 201,274.

Unfair Labor Practice Cases

Settlements

The Agency's effectiveness and efficiency in administering the Act is greatly enhanced by its ability to effect a voluntary resolution of meritorious unfair labor practice cases. Over the years, the Agency has had an excellent record in

achieving this end. FY 1985 was no exception: 8,988 settlements of unfair labor practice cases were obtained representing a rate of 94.4 percent as compared to 10,730 settlements in FY 1984 with a rate of 95.8 percent. Since FY 1960, the "raw" number of settlements increased each year until FY 1980 when it peaked at 11,721. The settlement rate over the same period has fluctuated from year to year but the general trend has been upward.

Complaints

In FY 1985, 3,018 complaints issued in a median of 44 days which represents a 16.4 percent decrease over the number of complaints issued in FY 1984. Historically, the number of complaints issued rose steadily until fiscal 1980, when 6,230 complaints issued. Since fiscal 1980, there has been a decline in the number of complaints issued which is in line with the decrease in case intake. It is noteworthy that in FY 1985 the percentage of pre-complaint settlement agreements, at 72.3 percent, was greater than the percentage of pre-complaint settlement agreements in FY 1984 (70.7 percent). Success at negotiating settlements before complaint issues and the lowered case intake explain the decline in numbers of complaints issued in FY 1985.

Merit Factor

The percentage of unfair labor practice cases in which a Regional Director determines that there is probable cause is called the Merit Factor. In FY 1985, that factor was 32.4 percent. This compares to a factor of 34.1 percent in FY 1984 and 34.8 percent in FY 1983. This figure has fluctuated between 31 percent and 34 percent for many years.

Litigation Results

Counsel for the General Counsel won 74.6 percent of Board and Administrative Law Judge decisions in whole or in part in FY 1985, an increase from the 72 percent litigation success rate in FY 1984. In the last 25 years the litigation success rate has remained high, fluctuating between 74.6 percent and 85 percent from year to year. These figures reflect the quality of Regional investigation, determinations and litigation.

Remedies

The effectiveness of the NLRB in resolving labor disputes and promoting industrial harmony can be measured in part by the actions taken by employers and unions to remedy their unfair labor practices. In FY 1985, a record $62,223,746 was distributed to employees as backpay, representing a 57.6 percent increase over the previous fiscal year, while the amount paid out to employees as reimbursement of fees, dues, and fines was $339,178, a decrease of 55 percent over the previous year. In the past 25 years there has been a fairly steady increase in backpay paid to employees from $1,139,810 in FY 1960 to the above-noted $62,223,746 in FY 1985. Figures for fees, dues and fine reimbursements are not available for FY 1960 but for FY 1965 the amount of fees collected was $25,420. Ten years later in FY 1975, the amount had increased to $733,010 and then declined to $339,178 in FY 1985. Also in fiscal 1985, 5,431 employees were offered reinstatement, compared to 6,245 in FY 1984.

Representation Cases

Elections

The Regions conducted 4,825 initial elections in FY 1985 of which 81.5 percent were held pursuant to agreement of the parties, compared to 4,769 initial elections and an 84.0 percent election agreement rate for FY 1984. The median time to proceed to an election from the filing of a petition was 47.9 days, a slight increase over the 47.6 day median in FY 1984. Historically, the number of elections has declined since FY 1980. The election agreement rate, however, has continued to rise. See the chart below.

Fiscal Year	No of Elections	Election Agreement Rate
1960	6,633	Not Available
1965	7,824	76.4
1970	8,161	75.4
1975	8,687	73.2
1980	8,350	79.9
1985	4,825	81.5

Regional Director Decisions

In FY 1985, Regional Directors issued 1,083 decisions in contested representation cases after hearing in a median of 42 days, bettering the goal of 45 days. This compares with FY 84, when 1,012 decisions issued in a median of 41 days. The number of Regional Director Decisions issued has generally followed the pattern of case intake. Thus, for example, in FY 1965 (FY 1960

figures are not available), 1,749 decisions issued. Five years later the figure was 1,802. In FY 1975, 2,250 decisions issued.

Representation and Union Deauthorization Hearings

In this category, 1,411 initial hearings were held in FY 1985 compared to 1,393 in FY 1984. The number of hearings held each year over the last 25 years, of course, as with Regional Director Decisions, has been directly affected by case intake and the increase in election agreements, as reflected by the following figures.

Fiscal Year	No. of Hearings
1965	1,952
1970	2,018
1975	2,471
1980	2,003
1985	1,411

Division of Enforcement Litigation

1. Appellate Court Activity

A. Intake and Productivity. In FY 85, the Appellate Court Branch was responsible for handling 378 cases, 252 of which were referred by the Regions for court enforcement and 126 cases in which petitions for review were filed by other parties. By filing briefs in 204 cases and securing compliance in another 171 cases, dispositions were made in 375 cases. In FY 84, total intake was 305 cases and dispositions totaled 262 cases. In FY 83, total intake was 366 cases and dispositions totaled 464. Oral arguments were presented in 184 cases in FY 85 compared with 194 cases in FY 84. The median time for filing applications for enforcement was 29 days in FY 85 compared with 18 days in FY 84. The median

time for both enforcement and review cases, from the receipt of cases to the filing of briefs, was 135 days in FY 85 compared with 132 days for FY 84.

B. Litigation Results

In FY 85, 188 cases were decided by United States Courts of Appeals compared with 259 cases in FY 84 and 338 cases in FY 83. Of these cases, a record 89.4 percent were won in whole or in part in FY 85 compared with 81.1 in FY 84 and 81.7 percent in FY 83. In FY 85, 5.8 percent were remanded entirely compared with 8.5 percent in FY 84 and 5.9 percent in FY 83. Also in FY 85, 4.8 percent were total losses, down from 10.4 percent in FY 84 and from 12.4 percent in FY 83. The FY 85 figure for total losses was the lowest in the history of the Agency.

By comparison, in FY 1960, the Courts of Appeals decided 125 cases of which 93 (74 percent) were enforced in whole or in part, 12 (9.6 percent) were remanded entirely and 20 (16 percent) were set aside.

2. Supreme Court Decisions. In FY 85, the Supreme Court decided three Board cases. The Board won two in full and lost one. In FY 84, the Supreme Court decided four Board cases. The Board won two in full and one in part, and lost one. In addition, in FY 84, the Board participated as amicus in two cases.

In FY 85, the Court granted three Board petitions for certiorari and three private party petitions. It denied 28 private party petitions. In FY 84, the Court granted five Board petitions and two private party petitions, while denying 34 private party petitions.

In FY 1960, the Supreme Court decided six Board cases on the merits. The Board was upheld in one case and reversed in five cases. In FY 1974 through FY 1985,

the Supreme Court decided 46 Board cases on the merits. The Board won 29 in full and six in part, and lost 11.

3. Contempt Activity. In FY 85, 135 cases were referred to the Contempt Litigation Branch for consideration for contempt or other appropriate action to achieve compliance with court decrees, compared to 146 cases in FY 84 and 115 cases in FY 83. Voluntary compliance was achieved in 31 cases during the fiscal year, without the necessity of filing a contempt petition, while in 57 others it was determined that contempt was not warranted. During the same period, 31 civil contempt proceedings were instituted, as compared to 25 in FY 84. These included five motions for assessment of fines and four motions for writs of body attachment. Seventeen contempt or equivalent adjudications were awarded in favor of the Board including two where compliance fines were assessed and two in which writs of body attachment issued. During the fiscal year, $83,000 in fines were collected, and the Board recouped in excess of $65,000 in court costs and attorney's fees incurred in contempt litigation.

4. Special Litigation Activity. In FY 85, the Special Litigation Branch had an intake of 77 cases and closed 90 cases leaving 43 cases on hand at the beginning of FY 86. This compares with an intake of 103 cases and the closing of 188 cases in FY 84. Additionally, in FY 85 the Branch filed 90 briefs: 35 district court briefs, 11 bankruptcy court briefs and 44 appellate court briefs. This compares to FY 84 when the Branch filed 90 briefs, consisting of 36 district court briefs, 14 bankruptcy court briefs, and 40 appellate court briefs. In FY 85, the Branch also participated in 31 oral arguments and received 54 decisions. During FY 1985, the Branch received 9 bankruptcy decisions, winning 6 and losing 3, 16 district court decisions, winning 14 and losing 2, and 29 court of appeals decisions, winning 25 in full and 1 in part, and losing 3 in full and 1 in part.

5. Appeals Cases. In FY 85, the Office of Appeals processed more cases than it received. It received 3,876 appeals from Regional Directors' refusals to issue complaint, a decrease from the 4,363 appeals received in FY 84, and the 4,463 appeals received in FY 1983. In FY 85, the office disposed of 3,930 appeals, also a decrease from the 4,363 appeals decided in FY 84, and the 4,463 appeals decided in FY 83. Thus, in FY 85, disposition exceeded intake by 54 cases. The percentage of reversal of Regional Directors' dismissals was 3 percent in FY 85 compared to 3.7 percent in FY 84 and 4.3 percent in FY 83. In addition, the Office processed to completion 63 appeals under the Freedom of Information Act from refusals of Regional Directors to disclose materials from case files. This compares with 72 in FY 84 and 91 in FY 83.

By comparison, in calendar year 1960 there were 973 appeals received and 1,031 appeals closed. No records were kept at that time on total sustained appeals. In 1960, the Office of Appeals had a staff of 14 attorneys including 3 supervisory attorneys compared to a 1985 staff of 37 attorneys including 7 supervisory attorneys. In 1960, the average number of cases processed per attorney per month was 7 whereas in 1985 the average number was 10.7.

Division of Advice

1. Advice Branch. In FY 85, the Regional Advice Branch received 715 cases and closed 701 cases. Although the number of pending cases thus increased from 44 at the end of FY 84 to 58 at the end of FY 85, this was well within the Branch's goal of having fewer cases on hand than a normal one-month intake. In addition, the median time for processing cases was substantially reduced. The figures were 29 days for FY 84 and 19 days for FY 85. The figure of 19 days is the best that the Branch has achieved in at least the past 10 years.

2. Section 10(j) Injunctive Activity. In FY 85, the Branch received 168 requests for Section 10(j) injunctive relief, down from 195 in FY 84. In FY 85, the Board authorized 10(j) proceedings in 38 cases. By contrast, in FY 84, the Board authorized 10(j) proceedings in 30 cases. Of the 38 cases authorized by the Board in FY 85, 22 cases were settled after authorization, 6 were won and 2 were lost. Four cases were pending at the end of the fiscal year and 4 were withdrawn because changed circumstances negated the necessity for injunctive relief. Thus, of the 30 cases that were pressed by the Board to a result, success was achieved in 28 cases (93 percent).

3. Section 10(l) Injunctive Activity. The Regional Offices filed 76 petitions for 10(l) injunctions with the appropriate district courts in FY 85, a 20 percent decrease from the 95 petitions filed in FY 84.

During FY 1985, the Injunctions Branch handled 81 cases involving circuit court litigation, contempt of district court decrees, or litigation advice to Regions. With particular respect to litigation, the great majority of these matters were resolved prior to the filing of an appeal. In the six cases where appeals were filed, and the case closed during the fiscal year, we were successful in five and lost one.

GENERAL COUNSEL'S OBJECTIVES

As the Agency begins its next 50 years, I have given considerable thought to the areas which need particular attention during my term as General Counsel. Some of the areas I have decided upon involve a continuation or an improvement of programs or practices which have in the past proven valuable to the efficient operation of the Office of the General Counsel; others involve developing new ways of doing things. Not all areas involve the public side of the Agency.

One important program we will continue to stress is settlements. In my view, a good settlement program is one which preserves the statutory purposes and which at the same time allows an immediate resolution of a labor dispute. The Office of the General Counsel has been balancing these twin objectives successfully for many years. A focus must be kept on the settlement process in order to maintain success in this area.

Similarly, in the area of timeliness, the Office of the General Counsel has been able over the years to maintain the delicate balance between giving each case the time and attention it deserves and meeting the time medians set for completing various stages of case processing. My aim is to continue to utilize our established time targets as management tools to assist the Agency in efficiently serving the public while insuring that there is no sacrifice of quality in the process.

I have also been and will continue to place new emphasis in the area of obtaining meaningful remedies and achieving compliance with Board orders to assure that we seek and obtain the best remedy in each case, with a goal of obtaining real life victories for Charging Parties, not just legal successes. In this regard, the Office of the General Counsel must be attentive to protecting the compliance process itself and we must move quickly and effectively to maintain the integrity of the system when it is being abused.

Other internal areas deserve focused attention as well. We will be examining pretrial and trial practices to determine whether modification would improve our litigation. We are now seeking ways to better forecast our case intake. Better methods of predicting the Agency's workload, in my view, are critical so that we can assess the need for additional resources or the need to trim resources; in either case to further improve the efficiency of our operations. Another area

for focus is automation of both casehandling information and support equipment. The automation process that has already begun with the purchase of new computer and word processing equipment will improve both the speed and the quality of the work product. A better system of shared casehandling information among the Regions and Washington will greatly strengthen our compliance efforts.

A major objective is the appropriate recognition of the staff of the General Counsel in the Regional and Washington offices. The Agency has always justifiably been proud of the quality of its employees and I share that pride. We are seeking new ways to recognize performance of those Agency employees who most effectively carry out their responsibilities. Finally, inasmuch as the business of this Agency is public service, I wish to improve its already effective programs to reach out to the public. While these objectives are by no means exclusive goals I would like to achieve during my tenure as General Counsel, they are among those on which we will focus special attention.

SUMMARY

Under the leadership of successive General Counsels, the Office of the General Counsel has shown that efficiency can be introduced into the Agency's casehandling system without forfeiture of the standards of quality necessary to effectively accomplish the Agency's statutory mission. As this Summary reflects, the Office of the General Counsel's effectiveness in administering the Act has been enhanced over the years by the attention it has focused upon the prompt resolution of labor disputes, by its emphasis on quality in casehandling and by its thorough training of its personnel. The success of those efforts can be measured, in large part, by such accomplishments as the overwhelming number of cases which are voluntarily settled or adjusted each year, the number of election agreements attained and the success of the Office of the General

Counsel in its litigation both before the Board and the Courts. This success has been achieved despite fluctuations in case intake, budgetary restrictions and occasional limitations on hiring. In each situation, the Office of the General Counsel has been able to meet the challenge by improved utilization of its resources and by the conscientious efforts of its staff.

With the sound systems and practices which the Office of the General Counsel has in place, it is anticipated that the public can look forward to 50 more years of prompt, effective service. However, as the Office of the General Counsel looks to the future, we will continue to seek new methods and other innovations to improve the efficiency and quality of our case processing, as our contribution to the public we serve.

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Friday, 10 April 1987

(R-1790)
202/632-4950

BOOK PUBLISHED ON HISTORY OF NATIONAL LABOR RELATIONS BOARD FROM 1935 - 1985

The National Labor Relations Board today announced the publication of a book describing 50 years of the agency's history -- from 1935, when it was created by the National Labor Relations Act, to 1985. The law established the right of workers to organize and bargain collectively, should they choose to do do.

NLRB - The First 50 Years was produced to commemorate the Board's 50th anniversary in July 1985. However, publication was delayed until now because of budgetary constraints. The 84-page, soft-cover book contains 192 photographs and 46 illustrations. Besides reviewing 50 years of the Board's history, the book discusses the origins of America's labor relations system from the colonial period.

The preface by President Reagan states in part:

"I had first-hand experience with the Board during my tenure as president of the Screen Actors Guild many years ago, and I can attest to its outstanding record. In conducting union representation elections and processing unfair labor practice charges, the NLRB has helped build a peaceful industrial relations system that is a model for the free world."

In the 50-year period covered by the book, the NLRB conducted about 345,000 union representation elections involving 33 million employees; it processed some 794,000 unfair labor practice charges, issued more than 46,000 decisions, and collected about $350 million in back pay for employees whose rights under the Act had been violated.

The book noted that NLRB has conducted elections ranging in size from two-employee units, including an election for two grave diggers, to the largest ever held --a War Labor Dispute Act strike vote conducted in December 1945, in which 686,000 steel workers were eligible to vote. Time taken to conduct balloting has ranged from 15 minutes for many elections to 112 days for one held aboard 20 ships in 1965. The most remote NLRB election took place in 1984 on the Island of Tinian, Northern Marianas, 9,000 miles from the agency's headquarters in Washington, D.C.

The book is available for sale at $6.50 per copy by contacting the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The stock number is 031-000-00270-2.

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

RELEASE IN AM PAPERS
Tuesday, 14 April 1987

(R-1789)
202/632-4950

CURTIS A. WELLS NAMED AN NLRB ASSOCIATE EXECUTIVE SECRETARY

Curtis A. Wells has been named an Associate Executive Secretary of the National Labor Relations Board.

A career NLRB employee, Mr. Wells, 36, had been serving since May 1984 as Resident Officer of the agency's Resident Office in Anchorage, Alaska. He moves to the office that is the conduit for all unfair labor practice and employee representation cases which reach the five-Member Board in Washington, D.C. The Office of the Executive Secretary also is responsible for administrative management of the Board's judicial affairs, including monitoring the progress of cases and motions to final Board decision.

Mr. Wells joined the NLRB in July 1976 as a Field Examiner in the Kansas City Regional Office. He transferred to the Birmingham, Alabama Resident Office in September 1979, and to the Des Moines, Iowa Resident Office in September 1981, prior to his appointment in Anchorage.

Born in Grafton, North Dakota, Mr. Wells graduated from Cavalier High School in Cavalier, N.D., in 1968. He attended Minot State College in Minot, N.D. for a year but interrupted his studies for a tour of duty with the U.S. Army from 1969-71 that included one year in Vietnam. After completing his military service, he returned to Minot State and received an A.A. degree in law enforcement in 1973.

Mr. Wells worked for Pan American Airlines as a security investigator the following year, resigning in 1974 to continue his education. He entered Florida State University in Tallahassee, Florida and received a B.S. degree in 1976.

Mr. Wells is married to the former Donna Truitt of Weaubleau, Missouri, who worked in the NLRB Kansas City Regional Office from 1972 to 1979.

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Friday, 14 November 1986

(R-1781)
202/632-4950

NLRB GENERAL COUNSEL DENIES APPEAL
OF RIGHT-TO-WORK GROUP IN SATURN CASE

Rosemary M. Collyer, General Counsel of the National Labor Relations Board, today announced that she has denied the appeal of the National Right to Work Legal Defense Fund, Inc. in the case involving the Saturn Corp. in Spring Hill, Tennessee.

The appeal arose after unfair labor practice charges filed by the Fund against General Motors Corp. and the United Auto Workers were dismissed by the Board's Regional Director in Detroit in July. These charges alleged that GM and the UAW gave an unlawful employment preference at the Saturn plant for employees now working at other GM facilities in bargaining units represented by the UAW. They also alleged that GM prematurely recognized the union as the collective bargaining representative at the Saturn facility.

In denying the appeal, General Counsel Collyer affirmed an earlier decision by the General Counsel's Division of Advice that the agreement between GM and the UAW did not give an illegal employment preference. The evidence established that General Motors has not granted hiring preferences at the Saturn facility on the basis of UAW membership. Instead, the General Counsel found that these preferences have been extended to GM employees represented by the UAW regardless of their individual status as members or non-members of the union.

Mrs. Collyer noted that an employer does not violate the law when it prefers its own employees for transfer as long as that preference is based on employment status and not on union membership. The General Counsel's decision

also pointed out that this agreement was the result of collective bargaining between GM and the UAW about the effects of the Saturn Project on the employment opportunities of currently working and laid off GM employees.

General Counsel Collyer also reaffirmed an earlier finding that the agreement between GM and the UAW concerning Saturn could not, as a matter of law, become a fully functioning collective bargaining agreement until and unless the UAW established that it has the support of a majority of Saturn's employees. In denying the appeal, the General Counsel relied on a 1975 decision of the Board which found such an agreement is permissible because it is legally presumed to be conditioned on proof of majority support for the union among the employees.

Mrs. Collyer's decision specifically rejected the contention that there is any agreement between the UAW and GM that would require any Saturn employee to become a member of the UAW, noting that the union security provision of the agreement is by its own terms subject to Tennessee law. In her letter denying the appeal, she stated: "Tennessee is a right-to-work state, and neither the union security provision nor the decision reached herein does anything to abrogate Tennessee law."

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

FOR RELEASE
Friday, 14 November 1986

(R-1780)
202/632-4950

LEONARD P. BERNSTEIN NAMED REGIONAL ATTORNEY IN NLRB PUERTO RICO OFFICE

General Counsel Rosemary M. Collyer of the National Labor Relations Board today announced the appointment of Leonard P. Bernstein as Regional Attorney in the agency's Puerto Rico office.

A career NLRB attorney, Mr. Bernstein, 36, has been serving since May 1983 as Supervisory Attorney in Region 21, one of NLRB's two offices in Los Angeles. He succeeds Michael S. Maram, who in August was appointed Regional Attorney in Memphis, Tennessee. In his new position, which becomes effective in January 1987, Mr. Bernstein will be responsible for all legal matters in NLRB cases arising in Puerto Rico.

General Counsel Collyer said in announcing the appointment: "Mr. Bernstein has had an exemplary career with the agency, with valuable experience on the staffs of two Board Members as well as regional office experience, including every area of casehandling. His outstanding record warrants this promotion."

Mr. Bernstein was first employed by the agency during the summer of 1973 as a Student Assistant (Legal), assigned to former Board Member Ralph E. Kennedy's staff. He was hired full time in August 1974 as a Law Clerk Trainee on that staff, and was promoted to Attorney Advisor in August 1975. A year later, Mr. Bernstein was reassigned to former Board Member Peter D. Walther's staff. In July 1977, he transferred to the NLRB's Philadelphia office as a Field Attorney, and in April 1981 he was promoted to Supervisory Attorney.

A native of New York City, Mr. Bernstein received his BA degree cum laude in 1971 at New York University, and his J.D. from George Washington University's law school in 1974.

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OFFICE OF THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D C. 20570

RELEASE

RELEASE IN AM PAPERS
Monday, 9 November 1987

(R-1803)
202/632-4950

QUARTERLY REPORT OF THE GENERAL COUNSEL

I. Introduction

This is the first edition of the General Counsel's Quarterly Report in some time. An increase in the caseloads of the Division of Advice and Office of Appeals during the past year, together with reduced staffing in those offices, required that we discontinue the Report for a short period. Quarterly Reports provide the labor-management community with an update on important labor law issues and with some insight into the casehandling approaches of the Office of the General Counsel. We anticipate regular Reports for the remainder of my term. This edition is limited to a single but important issue, cases arising under Section 8(f).

Since the issuance of the Board's decision in John Deklewa & Sons, Inc., 282 NLRB No. 184, we have been presented with a number of cases which involve issues arising in the wake of that opinion. Because Deklewa significantly changed the law governing collective bargaining relationships in the construction industry, I have authorized complaints in a variety of fact patterns raising substantial legal questions to afford the Board the opportunity to develop more fully the application and limitations of the Deklewa principles. This report sets forth my disposition of some of those cases, together with a brief discussion of the rationale therefor. The first section of the report discusses cases which raise the issue of whether a given relationship is to be viewed as a Section 8(f) relationship or as a Section 9 relationship. In the second section of the report, I discuss cases where the relationship is clearly a Section 8(f) relationship, and the issue concerns the obligations that may arise in such a relationship. The last section discusses cases where a Section 8(f) contract has come to an end and the union is using economic weapons to obtain a new contract.

Of course, these are not the only issues that have arisen in the wake of Deklewa. After other significant issues are resolved administratively, they will be discussed in future Quarterly Reports.

Rosemary M. Collyer
General Counsel

II. Determining Whether a Relationship Is a Section 8(f) Relationship Or a Section 9 Relationship

Case No. 1

The employer, as a member of a multi-employer group, had been bound to several contracts with the union. On 14 November 1983, the employer timely withdrew from the group. The employer wrote the union that it would bargain with the union for "a unit in which you represent a majority of our employees." The union responded that it did represent a majority of the employer's unit employees. Although the employer never asked for a demonstration of majority status, the evidence in our case showed that the union had majority status at that time. The parties proceeded to negotiate and agree upon a new contract. At the end of that contract the employer said that it was terminating the collective bargaining relationship.

We concluded that the employer's termination of the collective bargaining relationship was unlawful under Section 8(a)(5). In our view, when the employer and the union established their individual relationship, they made it clear in their correspondence that they intended their relationship to be a majority-based Section 9 relationship rather than a Section 8(f) relationship. Further, the evidence showed that the union had majority status at that time. Where, as here, the parties indicate their mutual intention to establish a Section 9 relationship, and there is majority support, we would regard the relationship as a Section 9 relationship. Accordingly, we regarded the relationship in the single employer unit in the instant case to be a Section 9 relationship from its inception. Thus, the employer could not withdraw recognition from the union in the absence of a showing of objective considerations to support a good faith doubt of majority status. There was no such showing here.

Case No. 2

The rationale set forth above has also been applied to a Section 8(b)(3) case. In that case, the employer was part of a multi-employer unit. However, in 1986 the employer timely withdrew from that unit. The employer said that "if the union represents a majority of the employees in an appropriate bargaining unit, the company will bargain in good faith for a new contract." Thereafter, the employer admitted the union's majority status. In addition, our evidence showed that the union had majority support at the time. The parties began bargaining.

However, in the course of that bargaining, the union insisted upon expanding the unit to include the employees of another entity. The evidence established that the entity was a separate employer and the unit was a separate unit.

We concluded that the relationship was a Section 9 relationship and that the union violated Section 8(b)(3). The statements exchanged between the parties clearly showed that they intended to establish a majority-based Section 9 relationship rather than a Section 8(f) relationship. As discussed supra, where the parties intend to establish a Section 9 relationship and majority status is shown, the relationship will be regarded as a Section 9 relationship. Since the instant case involved a Section 9 relationship and the union insisted upon bargaining in an inappropriate unit, the union violated Section 8(b)(3).

Case No. 3

We reached a similar result in another case, even though we could not affirmatively show that the union had majority status at the time when the relationship was established.

The employer recognized the union in 1980 and bound itself individually to a master agreement in the geographic area. In the memorandum of agreement, the employer affirmed that the union represented a majority of its unit employees. In 1986, during a contract hiatus period, the employer claimed that it was no longer doing business and thus it would not bargain for a new contract with the union. The union claimed that the employer was doing business in the guise of another corporate entity and sought information concerning the relationship between the employer and that entity. The employer denied the information request. It contended that its relationship with the union was a Section 8(f) relationship and that, since the contract had expired, the employer owed no bargaining obligation to the union.

We concluded that the relationship was a Section 9 relationship from its inception. The agreement of 1980 made it clear that the parties intended to establish a majority-based Section 9 relationship rather than a Section 8(f) relationship. Concededly, we were unable to produce the evidence that would establish that the union was in fact the majority representative at the time of recognition. However, the employer admitted majority status at that time. Further, where, as here, the parties intended to establish a Section 9 relationship, Section 10(b) of the Act would bar an assertion that the relationship was

not founded upon majority status. See Bryan Mfg. v. NLRB, 362 U.S. 411, 45 LRRM 3212. Indeed, Bryan specifically relies on the policy consideration of protecting collective bargaining relationships from attack six months after their establishment. See 45 LRRM 3212, 3218. Thus, we concluded that it was too late to attack the relationship on grounds of lack of majority status.

Case No. 4

In another case, we relied upon a prior settlement agreement to show the parties' intention to establish a Section 9 relationship.

In 1982, the employer withdrew recognition from the union. Relying upon then current law, the region concluded that the parties' relationship was a Section 8(f) relationship at its inception but that it matured into a Section 9 relationship when the union acquired majority support. After issuance of complaint, the parties entered into an informal settlement agreement in which the employer agreed to recognize and bargain with the union. The employer and the union then bargained and reached agreement on a contract. After expiration of that contract, the employer withdrew recognition from the union.

We concluded that the relationship became a Section 9 relationship upon the commencement of bargaining pursuant to the settlement agreement. Accordingly, the subsequent withdrawal of recognition was unlawful. The Section 9 allegations of the complaint in the prior case and the commitments undertaken in the settlement agreement led to the reasonable inference that the parties intended to establish a Section 9 relationship. The fact that the complaint was premised on the now invalid "conversion" doctrine was considered to be without legal significance. The crucial fact was that the employer, in the settlement agreement, recognized the union as the Section 9 representative, even though, as the law later developed, it was not obligated to do so. Further, the union in fact had majority status at the time of the settlement. Given the parties' intention to establish a Section 9 relationsip, and given the fact of majority status, we concluded that a Section 9 relationship was established. Accordingly, the employer's withdrawal of recognition, without showing a basis for doubt of majority status, was unlawful under Section 8(a)(5).

Case No. 5

We have also concluded that recognition extended prior to 1959 established a Section 9 relationship. In this regard we noted that Section 8(f) was passed in 1959. Hence, a relationship established prior to that time would either be a lawful majority-based Section 9 relationship or an unlawful minority-based Section 8(a)(2) relationship. The law presumes that parties have acted lawfully. Therefore, absent a showing that the union lacked majority status at the time of the pre-1959 extension of recognition, we concluded that the relationship was founded upon majority support. In addition, as discussed above, Bryan Mfg. would preclude a showing that the relationship was a Section 8(a)(2) relationship at its inception. Accordingly, we concluded that such pre-1959 relationships were Section 9 relationships.

III. Obligations Arising From a Section 8(f) Relationship

Case No. 1

The employer refused to supply information that was relevant to the question of whether the employer was honoring the contract. Under Deklewa, an employer has a Section 8(a)(5) obligation to honor the Section 8(f) contract. In view of this principle, we concluded that it would be reasonable to argue that an employer has an obligation to furnish information concerning whether it is obeying the contract. It should be noted that this argument would be made irrespective of whether there is a contractual provision requiring that the information be supplied.

Subsequent to our determination, the Board adopted the view that there is an obligation to furnish information relative to whether the contract is being obeyed, and that the duty exists irrespective of whether there is a contractual provision requiring that the information be supplied. See W.B. Skinner, 283 NLRB No. 149.

Case No. 2

The parties bargained for a new Section 8(f) contract and reached agreement on all terms and conditions of employment. Thereafter, the employer refused to sign the agreement. In our view, such conduct violated Section 8(a)(5). As noted above, the Board in Deklewa made it clear that parties to a Section 8(f) contract must carry out the terms of the contract. Where there

is full agreement on the terms of a contract, there is a contract within the meaning of Deklewa and either party may insist that it be reduced to writing and executed. In our case, there was a full agreement on a contract. Accordingly, in keeping with the policy of Deklewa, we concluded that the employer must sign the agreement and carry out its terms.

Case No. 3

After the expiration of the Section 8(f) contract, the union refused to bargain for a new contract unless the employer would agree to bind a related company to that contract. The evidence established that the related company was a separate employer and its employees were in a separate unit. Under Deklewa, the union was privileged to terminate the collective bargaining relationship after the expiration of the 8(f) contract. The fact that the union threatened to do so for a secondary purpose did not require a contrary result insofar as Section 8(b)(3) is concerned. However, we concluded that such conduct violated Section 8(b)(4)(B). In this regard, we noted that the union told employees that if the employer were nonunion, they would be forbidden to continue working for the employer. Thus, the union was effectively threatening a strike. Since the union's conduct therefore fell within the ambit of 8(b)(4)(i) and (ii), and since the objective was secondary, we concluded that the union's conduct violated Section 8(b)(4)(i)(ii)(B).

IV. Picketing And/Or Striking to Obtain a Successor Contract

Case No. 1

The employer exercised its right to withdraw recognition at the end of a Section 8(f) contract. The union picketed for more than 30 days for a new contract. We concluded that the picketing violated Section 8(b)(7)(C). We rejected the argument that Section 8(b)(7) applies only to picketing for initial recognition. In this regard, we noted that in Deklewa, the Board said:

> Even absent an election, upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship. The signatory will be free, at all times, from any coercive union efforts, including strikes and picketing,

> to compel the negotiation and/or adoption of a successor agreement.

Thus, the Board in Deklewa held that picketing for a contract is proscribed by Section 8(b)(7), even if there is a prior contract, where that prior contract is a Section 8(f) contract.

Case No. 2

In another case, we argued that the union's picketing was unlawful even though it terminated after 16 days. In this regard, we noted the Board's language in Deklewa, set forth above, which indicates that the employer isto be free "at all times" from "any" picketing. Concededly, the Board had previously held that a union can picket for a Section 8(f) contract for a reasonable period of time, ordinarily 30 days. See Los Angeles BCTC (Donald Schriver, Inc.), 239 NLRB 264, 269. However, the Board in Deklewa has arguably overruled that principle and has held that picketing for a successor 8(f) contract cannot ordinarily continue for 30 days. In support of our argument, we will contend that there is a distinction between picketing for a Section 9 relationship and picketing for a Section 8(f) relationship. Where the union seeks a Section 9 majority-based relationship, it necessarily seeks the support of unit employees. Hence, there is a legitimate basis for giving the union a reasonable period, usually 30 days, to persuade the employees to support the union. By contrast, where the union seeks a Section 8(f) relationship, its pressure is only on the employer; the employees need not select the union in order for there to be a relationship. Thus, there is no legitimate reason to permit the full 30 days of picketing.

Case No. 3

After the expiration of a Section 8(f) contract and the employer lawful refusal to bargain for a new contract, the union threatened to picket for a new Section 8(f) contract. That threat was outstanding for more than 30 days.

In our view, the threat was unlawful. In General Service Employees Local 73 (A-1 Security Service Co.), 224 NLRB 404, enfd. 578 F.2d 361 (D.C. Cir. 1978), the Board, after an exhaustive examination of the legislative history, concluded that a threat to picket fell within the ambit of Section 8(b)(7).

Concededly, A-1 involved a threat to picket by a noncertifiable union, and hence the threatened picketing would have been unlawful from the very first day. By contrast, the union in the instant case was certifiable and there were unit employees who could vote in a representation election. However, the Board's language in A-1 dealing with the purpose and legislative history of Section 8(b)(7)(C) was not confined to the particular facts of A-1. Indeed, that discussion preceded, and was separate from, the discussion of the noncertifiable nature of the picketing union in that case. Finally, footnote 8 of A-1 makes it clear that the Board did not intend to confine its opinion to the situation where the picketing union is noncertifiable and thus the picketing is unlawful ab initio. The footnote speaks of the computation of time in a "threat" situation, making it clear that a threat is within the ambit of Section 8(b)(7)(C), even where the reasonable time provisions would apply.

Moreover, it is clear that a threatened employer is "under the gun" as much as a picketed employer. General contractors would be reluctant to select such an employer, for, at any time, the threat could be implemented and havoc on the site would be created. Such a threat constitutes economic coercion to an employer whose livelihood depends on being selected for jobs. In the legislative compromise that gave birth to Section 8(b)(7)(C), Congress was willing to subject such an employer to 30 days of economic coercion, but no more. If the words "threats to picket" were not applied to Section 8(b)(7)(C), an employer would be subject to coercion for an indefinite period of time, simply because that employer chose not to subject its employees to an unwanted union.

Finally, the Board's decision on Deklewa supports this view. In that case, the Board stated that an employer who chooses not to continue a Section 8(f) relationship after the expiration of the contract "will be free, at all times, from any coercive union efforts, including strikes and picketing, to compel the negotiation and/or adoption of a successor agreement." Thus, the Board wants to protect such employers from any coercion, not just from picketing.

Case No. 4

After the expiration of a Section 8(f) contract and the employer's refusal to negotiate for a new contract, the union struck but did not picket, to obtain a new contract.

We concluded that the strike was lawful. Concededly, as noted supra, the Board in Deklewa suggested that a strike for a successor contract would be unlawful. However, Section 8(b)(7)(C) proscribes only picketing, not strikes. Further, there is no case support for the proposition that a strike for Section 9 recognition would be unlawful. In addition, Section 13 of the Act, states that, absent a specific provision in the Act, the right to strike should not be curtailed. In these circumstances, we concluded that the strike for recognition was not unlawful.

Case No. 5

The employer and a union voluntarily began bargaining for a new contract after the expiration of a Section 8(f) contract. Although the parties were unable to reconcile their differences concerning terms and conditions of employment, the bargaining continued. The union struck and picketed in support of its bargaining position. The employer contended that the picketing violated Section 8(b)(7)(C).

We concluded that the picketing was not unlawful. Although, as noted above, the Board in Deklewa indicated that picketing for a successor contract would be unlawful, that sentence immediately succeeded a sentence which indicated that the employer could withdraw recognition. Where the employer withdraws recognition and the union pickets to resecure recognition, the picketing has a recognitional object and falls within the ambit of Section 8(b)(7)(C). However, where as in our case, the employer was in the process of voluntarily bargaining for a new contract, the dispute was a bargaining dispute and not a recognitional one. In our view, it therefore did not fall within the ambit of Section 8(b)(7)(C).

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NATIONAL LABOR RELATIONS BOARD

Division of Information
Washington, D.C.

15 October 1987

Publications Available from the National Labor Relations Board

NLRB publications must be purchased from the Superintendent of Documents, U. S. Government Printing Office, Washington, DC 20402. Stock numbers and sales prices per copy are shown below. Orders should NOT be sent to the NLRB.

Single Publications

1. National Labor Relations Act and Labor Management Relations Act.
   (Stock No. 031-000-00255-9. Price $1.00)

2. 47th Annual Report of the National Labor Relations Board for Fiscal Year 1982
   (Stock No. 031-000-00241-9. Price $7.50)

3. 48th Annual Report of the National Labor Relations Board for Fiscal Year 1983
   (Stock No. 031-000-00253-2. Price $11.00)

4. Decisions and Orders of the National Labor Relations Board.

Volume	Stock No.	Price	Period Covered
265	031-000-00245-1	25.00	10/01/82 - 12/28/82
266	031-000-00247-8	23.00	12/29/82 - 08/04/83
267	031-000-00249-4	25.00	08/05/83 - 10/13/83
268	031-000-00250-8	25.00	10/14/83 - 03/05/84
269	031-000-00256-7	32.00	03/06/84 - 04/26/84
270	031-000-00259-1	42.00	04/26/84 - 06/28/84
271	031-000-00260-5	45.00	06/29/84 - 09/14/84
272	031-000-00262-1	34.00	09/15/84 - 11/30/84
273	031-000-00263-0	58.00	11/30/84 - 02/12/85
274	031-000-00266-4	44.00	02/13/85 - 04/05/85
275	031-000-00267-2	48.00	04/06/85 - 08/27/85
276	031-000-00267-1	45.00	08/28/85 - 10/29/85
277	031-000-00272-9	45.00	10/29/85 - 01/14/86

5. Court Decisions Relating to the National Labor Relations Act

Volume 26, Stock Number 031-000-00225-7, Price $24.00
Volume 27, Stock Number 031-000-00227-3, Price $12.00
Volume 28, Stock Number 031-000-00234-6, Price $18.00
Volume 29, Stock Number 031-000-00240-1, Price $20.00
Volume 30, Stock Number 031-000-00242-7, Price $28.00
Volume 31, Stock Number 031-000-00248-6, Price $38.00
Volume 32, Stock Number 031-000-00252-4, Price $37.00
Volume 33, Stock Number 031-000-00254-1, Price $43.00
Volume 34, Stock Number 031-000-00258-3, Price $45.00
Volume 35, Stock Number 031-000-00261-3, Price $41.00

6. Classification Outline with Topical Index for Decisions of the National Labor Relations Board and Related Court Decisions

(The outline, September 1982, provides a subject matter classification system for indices to procedural and legal issues of NLRB and related court decisions, using this classification system. In addition, it contains a topical index to the classification outline headings which provides an alphabetized word or term entry to all outline headings containing that word or term. Stock Number 031-000-00232-0. Price $24.00 domestic postpaid.)

7. Classified Index of National Labor Relations Board Decisions and Related Court Decisions (December 1976)

(Supplements the publications of the same title dated June 1974 and covers Board decisions and related court decisions issued from July 1, 1974, through December 31, 1976. Stock Number 031-000-00178-1. Price is $12.00.)

8. Classified Index of National Labor Relations Board Decisions and Related Court Decisions (December 1979)

(Supplements the publications of the same title dated June 1974 and December 1976, and covers Board decisions and related court decisions issued from January 1, 1977, through December 31, 1979. Stock Number 031-000-00202-8. Price is $23.00.)

9. Classified Index of National Labor Relations Board Decisions and Related Court Decisions (December 1982)

(Supplements the publications of the same title dated June 1974, December 1976, and December 1979 and covers Board decisions and related court decisions issued from January 1, 1980, through December 31, 1982. Stock Number 031-000-00235-4. Price is $18.00.)

10. Classified Index of National Labor Relations Board Decisions and Related Court Decisions (December 1986)

(Supplements the publications of the same title dated June 1974, December 1976, December 1979, December 1982, and December 1984. It covers Board and court decisions issued from January 1, 1985 through December 31, 1986.)

11. Classified Index of Decisions of the Regional Directors of the National Labor Relations Board in Representation Proceedings (December 1984)

(Supplements the publication of the same title dated December 1976 and covers Regional Directors final decisions issued from January 1, 1977, through December 31, 1981. Stock Number 031-000-00265-6. Price is $9.50-domestic; $11.90- foreign.)

12. Classified Index of Decisions of the Regional Directors of the National Labor Relations Board in Representation Proceedings (December 1985)

(Supplements the publications of the same title dated December 1976 and December 1981 and covers Regional Directors decisions issued in Representation proceedings during part of 1981 and all of 1982 and 1983. Stock Number 831-003-00004-9. Price is $19.00.)

13. Classified Index of Dispositions of ULP Charges by the General Counsel of the National Labor Relations Board (December 31, 1984)

(Supplements the publications of the same title dated December 1981 and covers Advice memoranda, Regional Directors dismissal letters and Appeals memoranda and dispositions issued by the General Counsel during calendar year 1984/1. Stock Number 031-000-00264-8. Price is $16.00.)

14. NLRB Style Manual

(Contains simplified rules for uniform Board and court citations, rules for improving legal writing without legalese, and lists of unions by official names and NLRB style. Stock Number 031-000-00237-1. Price is $12.00.)

15. NLRB Manual - Division of Judges

(The purpose of this manual, which consists of annotations regarding procedural and evidential problems, is to assist the administrative law judge in the hearing. Also included are a few guides as to the judge's conduct and an observation on the preparation of a judge's decision. This manual is not a digest; it does not cover substantive law, or all aspects of procedure. Stock Number 031-000-00246-0. Price is $9.00.)

16. NLRB - The First 50 Years

(Produced to commemorate the Board's 50th anniversary, the book reviews 50 years of the agency's history (1935-1985) and discusses the origins of America's labor relations system from the colonial period. The 84-page publication contains 192 photographs and 46 illustrations. Stock Number 031-000-002702. Price $6.50 -domestic, $8.15 - foreign.)

Subscription Service Publications

17. Weekly Summary of NLRB Cases

(Contains summaries of all published NLRB decisions in unfair labor practice and representation election cases; lists decisions of NLRB Administrative Law Judges and directions of elections by NLRB Regional Directors; carries guideline memoranda of NLRB General Counsel to field offices on case-handling subjects; carries notices of publication of volumes of NLRB decisions and orders; NLRB Annual Report and other agency informational literature. The subscription service is $75.00 a year for domestic mailing, $93.75 for foreign addresses. Stock Number 731-002-00000-2.)

18. NLRB Election Report

(This monthly report lists the outcome of secret-ballot voting by employees in NLRB-conducted representation elections in cases closed for each month. The report is compiled from results following resolution of post-election objections and/or challenges. It is arranged in two parts, single union elections and multi-union elections. The election tallies are listed by unions involved, with employer name and location. The subscription service is $27.00 for 12 issues mailed to domestic addresses, $33.75 for foreign subscriptions. Stock Number 731-001-00000-6.)

19. Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Series 8, as amended (1986)

    Subscription service includes supplements for an indefinite period. The service is in looseleaf form and is punched for three-ring binder; binder not included. (Stock Number 931-002-00000-7.) Price is $13.00 - domestic; $16.25 - foreign.

20. National Labor Relations Board Casehandling Manual

    (In three parts, this manual provides complete, updated General Counsel procedural and operational guidelines to NLRB Regional Offices in processing cases received under the Act. Part One is entitled "Unfair Labor Practice Proceedings," Part Two, "Representation Proceedings," and Part Three, "Compliance Proceedings and Settlement Agreements." The subscription service is $50.00 -domestic; $62.50 -foreign. Stock Number 931-001-00000-1.)

21. Classified Index of National Labor Relations Board Decisions and Related Court Decisions (June 1974)

    (A basic volume of Board Decisions cumulative from July 1, 1970, to June 30, 1974. Stock Number 831-003-00000-6. Price is $26.00 - domestic; $32.50 - foreign.)

22. Classified Index of NLRB Decisions and Related Court Decisions (CINLR)

    (Published on a quarterly basis, The Classified Index covers all Board, ALJs' and NLRB - related court decisions issued during period covering publication. Price is $18.00 for four issues. Stock Number 831-003-00000-6.)

23. Classified Index of Dispositions of Unfair Labor Practice Charges by the General Counsel of the National Labor Relations Board (CIDUL)

    (Published on an irregular basis and cumulated, it is compiled by the Office of the General Counsel, and is an index of Advice memoranda, Regional Directors dismissal letters, and Appeals memoranda and dispositions. Price is $22.00 for four issues.)

24. Classified Index of Decisions of the Regional Directors of the National Labor Relations Board in Representation Proceedings (CDLRB)

(Published on an irregular basis and cumulated, it is prepared by the Board's regional offices as an index to decisions issued by the Regional Directors. Price is $17.00 for four issues.)

Publications Available Without Charge

25. Your Government Conducts an Election for You on the Job

(Spanish edition is available.)

26. A Career in Labor-Management Relations as an Attorney

27. A Career in Labor-Management Relations as a Field Examiner

28. The National Labor Relations Board and You -- Unfair Labor Practices

29. The National Labor Relations Board and You -- Representation Cases

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Monday, 9 November 1987

(R-1802)
202/632-4950

NLRB RULES AND REGULATIONS REISSUED BY GOVERNMENT PRINTING OFFICE

The National Labor Relations Board today announced that the Government Printing Office has republished the Board's Rules and Regulations and Statements of Procedure. The new publication continues the previous looseleaf format.

The volume includes the full texts of the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA, the Taft-Hartley Act), as well as a statement of the organization and functions of the NLRB. The texts of the NLRA and the LMRA now include cross-references to the U.S. Code.

The Rules and Regulations contains all revisions made in 1986 that were previously published in the Federal Register. These revisions cover extensive changes in the time periods for filing documents with the Board. The statements of NLRB procedure incorporate changes made through this year.

The revised Rules and Regulations do not include two changes that have been published in the Federal Register in 1987: revisions to Sec. 102.118, Production of Agency Records or Testimony Concerning Agency Matters (52 F.R. 27990), and a new section, Sec. 103.20, Posting of Election Notices (52 F.R. 25215). Looseleaf inserts will be available from the Government Printing Office in a few weeks, and will be sent without additional charge to those ordering the new edition now.

Copies of the new edition are available at $13.00 each ($16.25 foreign) from GPO, Washington, D.C. 20402. Orders should include stock number 931-002-0000- 07. For more information on ordering, call GPO at 202/783-3238.

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Friday, March 18, 1988

(R-1812)
202/632-4950

NLRB GENERAL COUNSEL ISSUES REPORT ON FY 1987 OPERATIONS

Each year the National Labor Relations Board's Office of the General Counsel issues an overview of its operations. The Summary of Operations covering fiscal 1987 is attached.

SUMMARY OF OPERATIONS
Fiscal Year 1987

Introduction

This summary is a continuation of the General Counsel's practice of providing an annual overview of the operations of the General Counsel. The purpose is to focus on significant aspects of casehandling operations during this Fiscal Year.

As the summary reflects, case intake continues its downward trend of recent years to a level of 39,227 cases -- a dramatic drop of 31.6 percent from the highwater mark of 57,381 cases in Fiscal Year 1980.

The reduction is attributable to a number of factors, principally a decrease in union organizing and the continuing success of the General Counsel's Information Officer Program. The decrease in organizing is best reflected in the record 14,358 representation cases filed in Fiscal Year 1977, compared to the 6,874 cases filed in Fiscal Year 1987 -- a substantial 52 percent reduction in representation case filings.

The Information Officer Program, administered by the Agency's Regional Offices and designed to render assistance to members of the public with respect to potential violations of the Act, has handled 1,549,811 inquiries since Fiscal Year 1980. Through the IO Program, Regional personnel assist members of the public to ascertain whether their concerns come within the jurisdiction of the NLRB and, if not, to refer them to other Federal or State agencies which could be of assistance. We thus attempt to screen out and discourage the filing of clearly non-meritorious charges. Most significant for any analysis of case intake is the gradual decline in the ratio of charge acceptance under the IO Program. Thus, for example, in Fiscal Year 1980, Information Officers accepted charges in 9.2 percent of the inquiries received. In the years since then, that rate has gradually dropped, culminating in a rate of charge acceptance in Fiscal Year 1987 of 5.8 percent. If the 1980 acceptance rate had been constant throughout the years since then, the Agency would have received approximately 39,600 more charges than it did. For 1987 alone, that would have meant 6,600 more charges than we actually received.

In recent years, budget restrictions have resulted in a reduced staff through attrition. These staff reductions have been greater than the overall rate of case reduction, thus placing an increased strain on Regional and headquarters operations. Notwithstanding the staff and resource restraints, the headquarters and Regional Office staffs of the General Counsel have compiled another outstanding record of performance during Fiscal Year 1987. This continued record of excellent performance is a real tribute to each staff member and reflects the unswerving dedication of the staff to the effective administration of the Act.

I wish to extend my personal appreciation to the staff for their continued dedication and hard work and to those who practice before us for their assistance and cooperation.

Rosemary M. Collyer
General Counsel

ORGANIZATION OF THE OFFICE OF THE GENERAL COUNSEL

The Office of the General Counsel is composed of five major components or Divisions. These Divisions are responsible for the various casehandling, administrative and personnel functions of the Office. The five Divisions are: The Division of Operations-Management and Regional Offices, the Division of Advice, the Division of Enforcement Litigation, the Division of Administration, and the Office of Equal Employment Opportunity.

The Division of Operations-Management includes Headquarters and Regional Office staffs. The Headquarters staff has responsibility on behalf of the General Counsel for the operations of the Regional, Subregional and Resident Offices, and the coordination of the casehandling of those offices with the Washington divisions of the Office of the General Counsel and the Board.

There are 33 Regional Offices, 3 Subregional Offices and 16 Resident Offices. Each Regional Office is headed by a Regional Director who is responsible for the management of the office and any attached Subregional or Resident Offices and for the investigation and initial determination of the merits of unfair labor practice cases and representation cases. The Regional Director is also responsible for processing requests for information under the Freedom of Information Act.

The Division of Advice has the function of rendering substantive legal advice to the General Counsel and to Regional Offices in cases which involve novel or complex issues, cases of national interest or cases which involve developing and changing areas of the law. The Division also processes requests for injunctive relief under Section 10(j) of the Act, litigates injunction cases in Federal appellate courts under Section 10(l) and 10(j), and indexes and classifies Board and court decisions under the Act.

The Division of Enforcement Litigation is responsible for the Agency's litigation in the United States Court of Appeals, the Supreme Court of the United States, and for contempt and miscellaneous litigation in Federal and State courts to protect the Agency's processes and functions. The Office of Appeals is a major component of the Division of Enforcement Litigation. This office reviews appeals from Regional Directors' refusals to issue complaint in unfair labor practice cases and recommends action to be taken thereon by the General Counsel. It also processes appeals from the Regional Directors' denials of FOIA requests.

The Division of Administration is under the general supervision of the General Counsel and has been delegated responsibility for the development, direction and coordination of administrative staff support functions for both the Board and the General Counsel.

The Office of Equal Employment Opportunity is under the direction of the Board and the General Counsel and is responsible for the development, monitoring and evaluation of the Agency's affirmative action program and the processing of internal complaints of discrimination.

General Information

The information set forth below reflects the work of the various Divisions during this past fiscal year (FY 87). These statistics are preliminary and based on actions taken during the year.

Regional Offices

Case Intake

The NLRB has no authority to initiate proceedings on its own. Its processes can be invoked only by the filing of a charge or a representation petition by a member of the public. Total case intake during FY 87 was 39,227 compared to 42,283 cases in the previous year, representing a 7.2 percent decrease in intake. Unfair labor practice case intake at 31,757 decreased by 7.8 percent while representation case intake at 6,874 decreased by 4.8 percent below the previous year. In other types of cases filed (UD, AC and UC) there was a slight increase over the previous year's intake with the filing of 596 such cases as compared to 590 cases in the previous year. The total case intake figure of 39,227 cases represents the lowest case intake the Agency has experienced since Fiscal Year 1971.

Regional Professional Staff and Productivity

The average professional staff to handle the workload in the Regional Offices during FY 87 was 983 compared to 1,037 in FY 86, a decrease of 5.2 percent. This decrease in employment levels is the result of attrition and is part of management's efforts to maintain staff levels consistent with the levels of case intake. In the area of productivity [the measure of average monthly output per regional professional during the year], the FY 87 output per field professional per month increased from 128.1 units in FY 1986 to 130.1 units, an increase of 1.6 percent. The productivity figure is affected by a number of factors including case intake, average professional staff, attrition and the settlement rate.

Information Officer Inquiries

The General Counsel's Public Information Program continued to render assistance to members of the public by referring them to the appropriate agencies or organizations or to assist them in filing charges with the NLRB, where appropriate. In FY 87, the total number of inquiries received through the Public Information Program was 199,110, a decrease of 3.1 percent from the 205,461 inquiries received during FY 86. The rate of charge acceptance (percent of instances in which the contact results in a charge being filed) was 5.8 percent, as compared to 6 percent in FY 86.

Unfair Labor Practice Cases

Settlements

The Agency's effectiveness and efficiency in administering the Act is greatly enhanced by its ability to effect a voluntary resolution of meritorious unfair labor practice cases. Over the years, the Agency has had an excellent record in achieving this end. FY 87 was no exception: 8,960 settlements of unfair labor practice cases were obtained representing a rate of 92.7 percent as compared to 9,312 settlements in FY 86 a rate of 91.7 percent.

Complaints

In FY 87, 2,900 complaints issued in a median of 45 days which represents a 7.5 percent decrease in the number of complaints issued in FY 86. This total figure represents the lowest number of complaints issued since FY 74.

Merit Factor

The percentage of unfair labor practice cases in which a Regional Director determines that there is probable cause that a violation of the Act occurred is called the Merit Factor. In FY 87 that factor was 33.6 percent. This compares to a factor of 33.7 percent in FY 86. The merit factor has fluctuated between 31 percent and 34 percent for many years.

Litigation Results

Counsel for the General Counsel won 82.8 percent of Board and Administrative Law Judge decisions in whole or in part in FY 87, a slight increase over the 82.4 percent litigation success rate attained in FY 86. The litigation success rate is the highest it has been since FY 78 when a rate of 83.6 percent was achieved and continues to reflect the quality of Regional investigations and litigation.

Remedies

In FY 87, $36,329,193 was distributed to employees as backpay, representing a 30.9 percent increase over FY 86 in which $27,758,522 was distributed. The amount paid out to employees in FY 87 as reimbursement of fees, dues, and fines was $403,903 and represents a 70 percent decrease when compared to the record disbursement in FY 86 of $1,376,649. In addition, in FY 87, 3,512 employees were offered reinstatement, as compared to 4,531 in FY 86.

Representation Cases

Elections

The Regions conducted 4,173 initial elections in FY 87 of which 83 percent were held pursuant to agreement of the parties, compared to 4,520 initial elections and an 83.6 percent election agreement rate for FY 86. The median time to proceed to an election from the filing of a petition was 48.4 days, a slight increase over the 47.7 day median in FY 86.

Regional Director Decisions

In FY 87, Regional Directors issued 905 decisions in contested representation cases after hearing in a median of 43 days, bettering the goal of 45 days. This compares with FY 86, when 902 decisions issued in a median of 42 days.

Representation and Union Deauthorization Hearings

In this category, 1,206 initial hearings were held in FY 87 as compared to 1,235 in FY 86. The number of hearings held each year has declined over the last several years since they have been directly affected by the decrease in case intake and the increase in election agreements.

Division of Enforcement Litigation

Appellate Court Activity

Intake and Productivity. In FY 87, the Appellate Court Branch was responsible for handling 336 cases, 228 of which were referred by the Regions for court enforcement and 108 cases in which petitions for review were filed by other parties. By filing briefs in 194 cases and securing compliance in another 154 cases, dispositions were made in 348 cases. In FY 86, total intake was 421 cases and dispositions totaled 336 cases. Oral arguments were presented in 192 cases in FY 87 compared with 175 cases in FY 86. The median time for filing applications for enforcement was 29 days in FY 87 compared with 28 days in FY 86. The median time for both enforcement and review cases, from the receipt of cases to the filing of briefs, was 152 days in FY 87 compared with 132 days for FY 86.

Litigation Results

In FY 87, 199 cases were decided by United States Court of Appeals compared with 197 cases in FY 86. Of these cases, 87.4 percent were won in whole or in part in FY 87 compared with 82.3 percent in FY 86. In FY 87, 7 percent were remanded entirely compared with 7.1 percent in FY 86. Also in FY 87, 5.6 percent were total losses, down from 10.6 percent in FY 86.

Supreme Court Decisions

In FY 87, the Supreme Court decided two Board cases, the Board won one and lost one. In FY 86, the Supreme Court decided one Board case, which the Board lost. In addition, in FY 87, the Board participated as amicus in two cases. In FY 87, the Court granted two Board and one private party petitions for certiorari and denied 20 private party petitions. In FY 86, the Court granted two private party petitions for certiorari while denying 16 private party petitions.

Contempt Activity. In FY 87, 117 cases were referred to the Contempt Litigation Branch for consideration for contempt or other appropriate action to achieve compliance with court decrees, compared to 124 cases in FY 86. Voluntary compliance was achieved in 19 cases during the fiscal year, without the necessity of filing a contempt petition, while in 59 others it was determined that contempt was not warranted. During the same period, 20 civil contempt proceedings were instituted, as compared to one criminal and 24 civil proceedings in FY 86. These included five motions for the assessment of fines and two motions for writs of body attachment. Twenty-three contempt or equivalent adjudications were awarded in favor of the Board, including five where compliance fines were assessed, two in which writs of attachment issued, and one in which the Court ordered civil arrest and assessment of fines. During the fiscal year, the Contempt Litigation Branch collected $321,417 in fines and $530,228 in backpay, and recouped $57,054 in court costs and attorney's fees incurred in contempt litigation.

Special Litigation Activity. In FY 87, the Special Litigation Branch had an intake of 68 cases and closed 59 cases. This compares with an intake of 71 cases and the closing of 82 cases in FY 86. Additionally, in FY 87 the Branch filed 75 briefs: 45 district court briefs, 12 bankruptcy court briefs and 18 appellate court briefs. This compares to FY 86 when the Branch filed 73 briefs, consisting of 43 district court briefs, 5 bankruptcy court briefs, and 25 appellate court briefs. In FY 87, the Branch also participated in 33 oral arguments and received 31 decisions as follows: 3 bankruptcy decisions, winning all, 16 district court decisions, winning all and 12 court of appeals decisions, winning 8 and losing 4.

Appeals Activity. In FY 87, the Office of Appeals received 3,653 appeals from Regional Directors' refusals to issue complaint, an increase from the 3,580 appeals received in FY 86. In FY 87, the office disposed of 3,516 appeals, a decrease from the 3,619 appeals decided in FY 86. The percentage of reversal of Regional Directors' dismissals was 3.7 percent, exactly the same percentage as in FY 86. Median time to process appeals in FY 87 was 21 days as compared to 11 days in FY 86, a reflection of reduced staffing and increased case intake.

The Division of Advice

During fiscal year 1987, the Division of Advice closed 931 cases, an increase over the 771 cases closed in the prior year. This substantial closed case increase was accomplished despite a diminution in staff. On the other hand, the increase in closed cases, coupled with the decrease in staff, resulted in a rise to 27 days in the median time for processing cases, compared to the 21-day median of the prior year.

Section 10(j) Injunctive Activity

In fiscal year 1987, the Division of Advice received 155 Section 10(j) cases, slightly below the 163 cases received in the prior year. 1/ The Board authorized 37 injunction proceedings, compared to 43 in the prior year. Of the 37 cases authorized by the Board, 12 were won in litigation and 19 were settled. In one case, the petition was withdrawn because of changed circumstances, and three cases were pending at the end of the fiscal year. Only two cases were lost in litigation. Thus, the success rate (litigation victories and settlements, excluding withdrawn petitions and pending cases) was 94 percent.

Section 10(l) Injunctive Activity

The Regional Offices filed 68 petitions for 10(l) injunctions with the appropriate district courts in FY 87, a 30.6 percent decrease from the 98 petitions filed in FY 86.

Injunction Branch Litigation

During fiscal year 1987, the Injunction Branch handled 168 cases involving appeals from district court decisions in 10(j) or 10(l) cases, contempt of district court decrees, litigation advice to Regions in their litigation of 10(j) or 10(l) cases, and related EAJA proceedings. This compares to 128 cases handled during the prior fiscal year. Of the cases litigated by or with the assistance of the Branch, the great majority were resolved prior to a court decision. Of the 10 cases that resulted in a court decision, nine were won and one was lost.

1/ This year's figure does not include drug-testing cases which, pursuant to GC Memorandum 86-6, were required to be submitted to Advice regardless of whether the charging party requested 10(j) relief or the Regional Director sua sponte considered such relief warranted.

OFFICE OF THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C. 20570

RELEASE

FOR IMMEDIATE RELEASE
Monday, April 11, 1988

(R-1814)
202/632-4950

QUARTERLY REPORT OF THE GENERAL COUNSEL

This report covers cases decided during the fourth quarter of calendar year 1987. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I have sought and obtained Board authorization to institute injunction proceedings under 10(j) of the Act.

Rosemary M. Collyer
General Counsel

EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

Expelling a Non-Employee Union Organizer

During this reporting period, we considered whether a recent change in Board law would allow an employer to evict a nonemployee union organizer from its public-use cafeteria.

The case arose when the Union assigned a paid representative to organize the nurses at the Employer's hospital. As part of the organizer's effort, he purchased food and sat at a table in the hospital's public cafeteria where he then spoke with interested employees who came to his table. At no time did the organizer approach other tables or cause any disruption in ordinary cafeteria operations.

After several days, the Employer expelled the organizer and charged him with trespass. The Employer had no written rules governing cafeteria access and had not previously acted to control its public use. Further, the Employer in the past had permitted medical book fairs, pharmaceutical company displays, and insurance company solicitations to occur in the cafeteria.

Under long-standing Board law, dating back to Marshall Field & Co., 98 NLRB 88 (1952), the Board has held that public restaurants located within a retail facility are public, nonworking areas where an employer cannot prohibit solicitation by nonemployees. For example, in Montgomery Ward & Co. Inc., 256 NLRB 800 (1981), the Board found a no-solicitation rule to be unlawful when applied to prohibit nonemployee organizers from meeting with off-duty employees in a department store restaurant, so long as the individuals conducted themselves in a manner consistent with the purpose of the restaurant. The Employer in our case argued that, under the Board's recent decision in Fairmont Hotel, 282 NLRB No. 27 (1986), the Employer's private property rights in the cafeteria allowed its expulsion of the organizer. In Fairmont, the Board held that a union did not have an unqualified right to distribute handbills on a hotel's property, and announced a new legal test for balancing employer private property rights against employee Section 7 rights. We decided that the Board cases prior to Fairmont should apply, and that they warranted a complaint in this case.

In Dunes Hotel & Country Club, 284 NLRB No. 96 (1987), a decision issued after Fairmont, the Board adopted the decision of an Administrative Law Judge that a casino violated

Section 8(a)(1) of the Act by banning nonemployee solicitation and distribution anywhere on its property. The Judge had relied upon Montgomery Ward, supra, for the proposition that a blanket prohibition is unlawful when applied to public areas, such as bars and restaurants. Since Dunes Hotel came after Fairmont, we concluded that Montgomery Ward continues to be the proper analytical approach where an employer attempts to prohibit solicitation or distribution in a restaurant open to the public. We also concluded that there is no rational basis for distinguishing between restaurants in retail enterprises and restaurants in hospitals. In both, the restaurant is open to the public. And in the instant case, there was no showing that the solicitation had a deleterious impact on patient care. Since the organizer in our case used the Employer's cafeteria in a manner fully consistent with its purpose, his expulsion violated the Act.

Reporting Managerial Misconduct as Protected Activity

An interesting case decided during the period considered whether employees were engaged in protected activity when they reported to the Employer's board of directors that illegal kickbacks were being received by the Employer's general manager.

The Employer operated a farmer's feed cooperative. Two employees learned that one of the Employer's drivers was transferring kickback payments to the Employer's general manager. The general manager was allegedly receiving payments from customers in return for special favors which the manager could give. One of the employees reported the alleged illegal kickbacks to a member of the Employer's board of directors and also stated that she feared she would be discharged because of her knowledge of the scheme. The board of directors held a meeting where both employees appeared to discuss the problem. One of the employees stated that she hoped the board would resolve the situation so everyone could get back to work and not have the problem hanging over their heads all the time. Later, both employees were discharged in circumstances indicating that the discharges were in retaliation against the employees' having reported the plant manager's alleged kickback operation. We decided that the discharges violated Section 8(a)(1) of the Act because the employees' conduct constituted protected activity.

In Eastex v. NLRB, 437 U.S. 556, 565 (1978), the Supreme Court stated that Section 7 of the Act protects employees who seek "to improve terms and conditions of employment or

otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." In our view, the two employees' allegations of illegal payments to the manager were protected under Eastex because the illegal kickback scheme had a potential impact upon the employees' employment. First, the employees reasonably believed that the corrupt scheme would ultimately be harmful to the business, and that this would ultimately have an adverse impact on employees. Secondly, the employees feared that the corruption and their knowledge of it would ultimately be revealed, with negative consequences for them.

In Squier Distributing Co., 276 NLRB 1195 (1985), employees reported to police the suspicious check cashing activities of one of the company owners. The employees feared that the owner's conduct could lead to the company's financial failure. The Board held that employees' conduct, motivated by their interest in safeguarding their own jobs, was protected activity. Similarly, the employees in our case were concerned about the economic impact that the alleged corruption would have on them as employees. We therefore decided that the employees' reporting activity was protected activity.

EMPLOYER DISCRIMATION

Employer Unfair Labor Practices Balanced Against Striker Misconduct

During this quarter, we considered whether employer unfair labor practices which had caused a strike should be weighed against the picket line misconduct of two unfair labor practice strikers in determining whether the strikers should be reinstated.

During the course of an unfair labor practice strike, striking employee A berated a job applicant, poking him in the chest, and also momentarily jumped on the bumper of a delivery van attempting to enter the Employer's premises. Striking employee B on two occasions dropped a plywood picket sign onto vehicles leaving the plant. Striker B stated that he dropped the picket sign on the second occasion while he was trying to get out of a vehicle's way as it headed for him. The strike was in protest of the Employer's bad faith surface bargaining which had been continuing for approximately one year.

Under NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954), misconduct by an unfair labor practice striker would not automatically preclude that striker's reinstatement. 213 F.2d at 753. Instead, the Board would consider the employer's unfair labor practices which had provoked the strike and balance them against the striker's misconduct. The Board would find reinstatement appropriate if the employer's violations were more egregious than the employees' misconduct.

The Thayer balancing doctrine has been called into question by the Board's decision in Clear Pine Mouldings, Inc., 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985). In Clear Pine Mouldings, the Board held that strikers are not protected by Section 7 of the Act when they engage in misconduct that tends to coerce or intimidate nonstrikers in the exercise of their right not to strike. Board Chairman Dotson and Member Hunter expressly rejected the Thayer balancing doctrine in Clear Pine Mouldings. 268 NLRB at 1047. Members Zimmerman and Dennis, however, filed a concurring opinion, and they cited Thayer as supporting their view. 268 NLRB at 1049. Subsequent Board cases have not resolved the issue of whether Thayer continues to be Board law. We decided to argue for reinstatement in this case under the Thayer test in order to place this issue before the Board.

Striker A's misconduct, viz., poking a nonstriker and jumping on a delivery van bumper, was less egregious than the Employer's lengthy unlawful refusal to bargain. Striker B's dropping of picket signs onto two cars was outweighed by the Employer's extended violation.

It also appeared that Striker B's second act of misconduct was provoked by the vehicle's heading toward him. We noted that the Board has left open the issue of whether, separate and apart from Thayer, striker misconduct can be excused by direct employer provocation. See Axelson, Inc., 285 NLRB No. 118, slip p.9 note 8 (1987). Under this view, "[a]n employer cannot provoke an employee to the point where [the employee] commits... an indiscretion... and then rely on this to terminate [the] employment." NLRB v. M&B Headware Co. Inc., 349 F.2d 170, 174 (4th Cir. 1965), quoted in E.I. Dupont de Nemours, 263 NLRB 159, 160 (1982). We therefore decided to investigate whether the vehicle that headed toward Striker B was being driven by an agent of the Employer. If it was, then that striker's reinstatement would be appropriate under both the Thayer balancing test and a provocation rationale.

EMPLOYER REFUSAL TO BARGAIN

Remedy for Unilateral Drug Testing

During this quarter, I issued a "Guideline Memorandum Concerning Drug or Alcohol Testing of Employees" stating my position that drug testing of employees encompasses a mandatory subject of bargaining, and that implementation of a drug testing program is a substantial change in working conditions, even where physical examinations had been given previously, and even where established plant work rules had prohibited drug use or possession in the plant. (General Counsel Memorandum 87-5 dated 8 September 1987). Shortly after that Guideline Memorandum issued, we considered the question of what remedy to seek in a case where employees had been discharged for testing positive under a unilaterally and unlawfully promulgated drug testing program.

In this case, the Employer had in effect two work rules which prohibited (1) the use, possession or sale of drugs or alcohol on company premises; and (2) being under the influence of drugs or alcohol on company premises, or refusing to submit to a test if there was a reasonable basis for believing that the employee was under the influence of drugs or alcohol. The Employer then unilaterally implemented an additional policy of random, periodic employee drug testing. In addition, under this new policy, a positive test could result in discharge. We concluded that the new policy was in violation of Section 8(a)(5). Several employees were later discharged after testing positive under the unilaterally implemented new program. We decided that there is a rebuttable presumption in favor of reinstatement and backpay as the appropriate remedy for employees who are discharged for the sole reason of having tested positive under an unlawfully implemented policy.

It is well established that a make-whole order is the normal Board remedy where an employer has made unlawful unilateral changes in employee working conditions. For example, in Boland Marine Mfg. Co., 225 NLRB 824 (1976), the Board ordered reinstatement and backpay for all employees who were disciplined under a unilaterally and unlawfully implemented system of work rules and discipline. And in Lockheed Shipbuilding Co., 273 NLRB 171 (1984), the Board ordered reinstatement and backpay for employees who were terminated or refused employment after undergoing unlawfully implemented medical tests. We decided that Taracorp Industries, 273 NLRB 221 (1984), where the Board did not order a make-whole remedy, was not inconsistent with these make-

whole remedy cases. In Taracorp, the employer violated Section 8(a)(1) of the Act by denying an employee's request for union representation at an investigatory interview. The employee was being disciplined for transgressing a valid work rule. The employer's violation arose, therefore, not from any invalidity of the work rule, but instead from the unlawful investigatory interview. In contrast, the employees in our drug testing case, as well as the employees in Boland Marine and Lockheed Shipbuilding, were disciplined solely because they transgressed the unlawfully implemented work rule itself.

Although we decided that reinstatement and backpay were presumptively appropriate, we also decided that this presumption was rebuttable and could be overcome if the employer could prove that the disciplined or discharged employee was otherwise unfit for employment. We noted that in North Star Refrigerator Co., 207 NLRB 500 (1973), enfd. in part sub nom. NLRB v. Magnusen, 523 F.2d 643 (9th Cir. 1975), reinstatement was found proper for an unlawfully discharged employee even though that employee had been insubordinate and had violated safety rules. Reinstatement was not ordered in that case, however, for another employee who had stolen from the employer and had committed perjury at the Board hearing. We decided that in our case, the Employer could rebut our presumption and establish unfitness for employment by showing that (1) the employee is a drug or alcohol user; and (2) the employee's particular employment position is incompatible with drug or alcohol use.

Concerning the first factor--employee use of drugs or alcohol--we decided that the Employer could make this showing by relying upon the fact that the employees here failed the drug test. We recognized the argument that, since the test was part of the unlawful new program, it should not be relied upon. However, the test itself was not in dispute, i.e., the test was the same one lawfully in use under the Employer's previously existing lawful work rules. The violation in our case did not concern any unlawful changes in the drug test, but rather concerned only the circumstances when the Employer could administer the test. We therefore decided that the Employer could rely upon the test results to show drug or alcohol use. Concerning the second factor, the Employer would have to show that the particular kind and level of drug found in the particular employee's system makes that employee unfit for his or her employment. For example, the Employer would clearly rebut the presumption in favor of reinstatement if it found substantial quantities of a powerful substance in an employee who had a sensitive or dangerous job. Conversely, if the Employer found trace amounts of some lesser substance in an employee with a

nonsensitive, nonhazardous job, reinstatement would arguably remain the appropriate remedy.

Successorship of an Employee Leasing Company

An interesting successorship case arose this quarter when company A hired all the employees of a closing business and then leased these employees to company B who purchased the assets from the closing business and continued to operate it.

For several years, a vending machine service and repair business operated with employees represented by the Union. As a result of financial problems, the owners of the business decided to liquidate it. The general manager of the business formed company B which bought all of the closing business' assets. Company B hired no employees, however. Instead, company B contacted company A, which was in the employee leasing business, and suggested the possibility of A's supplying B with employees. A then interviewed all of the predecessor's unit employees explaining to them the proposed employee leasing arrangement with B. All of the predecessor's employees accepted employment with A at the same wage rates but with some changes in various benefits. A also hired the predecessor's office secretaries and gave them the additional responsibility of supervising the vending employees. The former secretaries were to determine the employees' routes and resolve any complaints from company B.

The employee leasing agreement provided for A to furnish B with employees on a cost-plus basis. A paid the employees, provided them with companywide benefits, and supervised them. B purchased all the assets of the closed business, including the trucks, machines and equipment. As a result, A's employees continued their work virtually unchanged and without any hiatus in operations. Company A refused to respond to the Union's bargaining requests.

We decided that company A was a successor to the predecessor business' bargaining obligation under NLRB v. Burns Int'l Security Service, 406 U.S. 272 (1982). Under Burns, the Board considers whether there has been sufficient continuity in the employing enterprise by examining the totality of circumstances including whether there was continuity in the business operation, plant, work force, jobs and working conditions, supervision, machines, equipment and methods of production, and product or service. Although no one factor is determinative, the most critical inquiry is whether essentially the same work force is retained. Indianapolis Mack Sales and

Service, Inc., 272 NLRB 690 (1984). "In conducting this analysis, the Board keeps in mind whether those employees who have been retained will understandably view their job situation as essentially unaltered." Fall River Dyeing and Finishing Corp. v. NLRB, ___U.S.___, 125 LRRM 2441 (1987).

We decided that employee leasing company A was a successor because of substantial continuity in work force, working conditions, jobs, equipment and service operations, and plant. In other words, all of the predecessor's employees reported to the same location and performed the same jobs at the same wages with no interruption in operation. We recognized a difference in the employees' supervision which is now done by the secretaries. However, since the employees spent most of their workday away from the facility, this factor was of minimal importance. We recogized that company A was in the employee leasing business, while the predeccessor was in the vending machine business. We also recognized that company B had legal ownership of the equipment. However, company A's employees continued to work with this same equipment, i.e., the employees themselves viewed their jobs as essentially unaltered - a factor emphasized by the Supreme Court in considering whether there has been "substantial continuity" between employing enterprises. In these circumstances, these facts were considered insufficient to outweigh all the other indicia of Company A's successorship.

Recruitment Program as Mandatory Subject

This quarter we considered whether a hospital had to bargain over a recruitment incentive program that offered money to employees who successfully recruited new nursing employees for the hospital.

The Union represented approximately 650 registered nurses working for the Employer hospital. In response to a chronic nursing shortage, the Employer began a recruitment program to fill 40 vacancies. Under the program any hospital employee would receive an initial $250 for referring a nurse who was hired and who completed the probationary period. The referring employee would receive an additional $750 if the nurse remained for one year. The Employer refused to bargain over the program, claiming that the small amounts of money involved constituted a gift and therefore not a mandatory bargaining subject. We decided that the recruitment incentive program did encompass a mandatory subject.

The Board has long defined mandatory subjects of bargaining as including "all emoluments of value or other benefits accruing to employees out of their relationship with their employer." Detroit Resilient Floor Decorators Local Un. No. 2265 (Mill Floor Covering, Inc.), 136 NLRB 769, 771 (1962). Emoluments of employment are mandatory subjects even if they involve only potential or uncertain amounts. See, e.g., Winn-Dixie Stores, Inc., 224 NLRB 1418 (1976). On the other hand, in Benchmark Industries, 270 NLRB 22 (1984), the Board found that Christmas dinners, given to all employees regardless of any employment related factors, were gifts and not terms or conditions of employment encompassing a bargaining obligation.

We decided that the recruitment incentive program constituted a valuable emolument of employment and not a mere token gift. First, the potential amount of $1000 for every successful recruitment involved far more than the dinners in Benchmark. Second, the incentives in our case were not uniformly and indiscriminately distributed to all employees. They were instead earned by only those employees who recruited successfully. Finally, the benefits grew out of the employment relationship; nonemployees were not eligible for the benefit.

UNION RESTRAINT OR COERCION

Restrictions on Resignation

During this quarter we considered two cases involving various rules contained in a union's constitution which restricted the right of members to resign their membership.

Specifically, the rules provided that (1) a member can resign only if he or she is in good standing; (2) resignations must be in writing; (3) copies of the resignation must be sent by certified or registered mail to both the Local Union's and also the International Union's secretary-treasurer; and (4) resignations are effective only after 30 days and are not effective if offered in anticipation of the filing of intraunion charges.

We decided that the first and fourth requirements, were unlawful as was the requirement of service upon the International Union's secretary-treasurer. The other requirements were considered lawful.

Concerning the good standing requirement, the Board has expressly held that this is an unlawful restriction on resignation. See, e.g., UAW Local 73 (McDonnell Douglas Corp.), 282 NLRB No. 64 (1986). Concerning the 30 day postponement of the effective date, the Board has found in analogous circumstances that similar rules postponing the effect of resignations are unlawful. See, e.g., Operating Engineers, Local 12 (Associated Engineers), 282 NLRB No. 180 (1987). The Board also has held that union rules which prohibit resignations if intraunion charges are pending constitute an unlawful restriction. OCAW (Texas Refining and Marketing), 283 NLRB No. 12 (1987). We therefore decided that the similar rule in our case, barring resignations if offered in anticipation of the filing of internal charges, was unlawful.

On the other hand, the Union's notification requirements were lawful, except as noted supra. In Takoma Boatbuilding Co., 277 NLRB 513, 515 (1985), at note 7, the Board assumed the legality of a certified letter requirement, referring to it as a "procedural restriction" that does not substantively interfere with employees' right of resignation. In subsequent cases, the Board either "assumed the lawfulness" of such a requirement, New York Telephone Co., 278 NLRB No. 144 (1986), sl. op. p. 1, note 7, or did not pass upon the requirement, Local 128 UAW (Hobart Corp.), 283 NLRB No. 171 (1987), sl. op. pp. 6-7. We decided that the requirement that resignations be in writing similarly served only a ministerial function which helped to insure orderly administration of the Union's resignation process. We noted that in Machinist Local 1327, (Dalmo Victor), 263 NLRB 984, 992-3 (1982), the separate concurring opinion of Chairman Van de Water and Member Hunter did not consider a writing requirement to be unlawfully restrictive but did consider unlawful any substantive restriction on a member's right to resign. The entire Board subsequently agreed with this concurring opinion. Machinists Local 1414, (Neufeld Porche-Audi), 270 NLRB 1330 (1984).

Concerning the requirement that the resignation be served upon the Local Union's secretary-treasurer, we noted that the Local was the Section 9 representative and that the secretary-treasurer normally handled the Local's financial matters. However, the last requirement, that notice be served upon the secretary treasurer of the International Union, was considered to be an unlawful restriction. Unlike the notice to the Local, this second certified or registered mailing seemed to be a burden to employees which was not outweighed as a convenience to the Local Union in processing resignations. We therefore decided that this

requirement unlawfully restrained employees in their statutory right to resign.

Second Initiation Fee Acting as a Penalty

During this quarter, we decided that a union could not require an employee to pay a second initiation fee where such fee operated as a penalty upon that employee's statutory right to resign.

During an economic strike, an employee lawfully resigned her membership and revoked her checkoff authorization. When the strike ended, the employee continued to refrain from paying any Union dues because the plant where she was working was located in a right-to-work state. Seven months later, the employee was transferred to another plant within the same bargaining unit. This plant was located just across the state line in a state without a right-to-work law.

The Union sent the employee membership application and checkoff authorization forms, and also requested payment of a new initiation fee. The employee signed the checkoff authorization, but declined to become a full Union member and to pay the new initiation fee. We decided that the Union's demand for a second initiation fee unlawfully penalized this employee for having previously exercised her statutory right to resign from the Union.

In Professional Engineers Local 151 (General Dynamics), 272 NLRB 1051 (1984), two employees resigned their union memberships and returned to work during an economic strike. Two months later the strike ended and a new bargaining agreement was entered into containing another union security clause. The union immediately asked the two employees to reapply for membership. The employees agreed to pay dues but declined to apply for full union membership. The union insisted that, even if the employees did not become full members, they had to pay the uniformly required union initiation fee. The Board found the assessment of a second initiation fee to be a violation of Section 8(b)(1)(A) of the Act.

The Board noted that the two employees had already paid an initiation fee, and also had continued to be unit employees through the strike. The only difference between these two employees and the rest of the unit employees was that these employees had exercised their statutory right to resign and become financial core members. Therefore, the Board found the

imposition of a second fee to act as a penalty for the exercise of statutory rights. Id. at p. 1052.

We recognized that, in our case, the employee had begun work in another plant. However, both plants were in the same unit and an initiation fee had already been paid in that unit. We also recognized that there was a substantial time delay between the strike at which time the employee resigned, and the Union's attempt to collect a new initiation fee. However, but for the resignation, the employee would not have been required to pay a new initiation fee. Thus, we decided that the new fee in our case acted as an unlawful penalty upon the employee's statutory right to resign.

Union Fine of Employer's Supervisor Who Adjusted Non-Contractual Grievances

During this quarter we considered whether a union's fining of a supervisor, whose responsibilities included adjusting non-contractual grievances of employees, coerced an employer in the selection of its representatives in violation of Section 8(b)(1)(B).

The Employer, a drywall subcontractor, appointed a superintendent as its highest ranking representative on a project. The superintendent spent most of his time hanging sheetrock, and also spent around one hour a day performing supervisory tasks, for which he reported directly to the Employer's owner. Although no grievances have ever been advanced by any employees, the superintendent would have been the first person to attempt to resolve any grievances against the Employer.

Around the time that the Employer appointed the new superintendent, the Employer also timely withdrew from a multiemployer bargaining unit and began negotiations with the Union on an individual basis. When negotiations broke down, the Employer lawfully implemented its proposals. Shortly thereafter, the Employer's superintendent resigned his Union membership. The Union then fined the superintendent for violating both its trade rules and the Union's constitution by working for a nonsignatory employer and working for less than negotiated wages.

In NLRB v. IBEW Local 340, ___U.S.___, 125 LRRM 2305 (1987), the Supreme Court held that a union, which fined supervisor-members for working for non-union employers, did not violate Section 8(b)(1)(B), in part because the supervisors did not have any authority to adjust grievances or to take any part

in contract interpretation. The Court rejected the argument that all employer-supervisors fell within the protection of Section 8(b)(1)(B). The Court held instead that this Section was intended only to prevent a union from impermissably affecting the manner in which a supervisor-member might carry out his or her grievance-adjustment or negotiating duties.

In our case, the superintendent was the Employer's highest ranking representative on the site and was its first level authority for adjusting non-contractual grievances. The Board has held that the distinction between contractual and personal grievances is irrelevant to a Section 8(b)(1)(B) analysis. See, J. H. McNamara, Inc., 284 NLRB No. 145, sl. op. pp. 1-2, note 1 (1987). Since the Court in IBEW Local 340 expressly declined to pass on this issue, 125 LRRM at 2311, note 12, the Board's position remains viable. The mere fact that no grievances had actually arisen was irrelevant since the Court in IBEW Local 340 spoke only in terms of whether a supervisor had the appropriate authority under Section 8(b)(1)(B). Since the superintendent in our case had the appropriate authority, we concluded that he was a Section 8(b)(1)(B) employer representative.

The Court in IBEW Local 340 also held that where the coercion is visited upon the employer representative, rather than directly upon the employer, the Section 8(b)(1)(B) violation depends upon a showing that there is a collective bargaining relationship between the employer and the union. As noted supra, the parties in our case have such a relationship, and thus that part of the IBEW Local 340 test is satisfied.

Finally, we noted that the purpose of the Union's fine in our case was to prevent the Section 8(b)(1)(B) representative from serving the Employer. Therefore, in our view, the object was to interfere with the Employer's selection of a Section 8(b)(1)(B) representative. In addition, we concluded that, even if the Union did not succeed in removing the representative from the employ of the Employer, the fine would at least have the predictable consequence of affecting the manner in which he performed his Section 8(b)(1)(B) tasks in the future.

We therefore decided that the Union's fines violated Section 8(b)(1)(B).

UNION DISCRIMINATION

Advance Payment of Union Dues

We considered during this quarter whether a union could lawfully cause the discharge of an employee under a contractual union security clause because of the employee's failure to pay union dues in advance.

The Union's bargaining agreement contained a standard 30 day union security clause. The Union's by-laws provided for monthly dues payment on or before the first day of the month. In practice, however, the Union billed and collected dues on a quarterly basis, i.e., employees paid dues in advance for a three month period. If the employee did not pay his or her three months' dues by the 15th day of the second month, the Union mailed a notice of membership suspension and job removal. If the employee did not respond, the Union notified the Employer of nonpayment.

Our case arose when an employee did not respond to the Union's notice of delinquency on the 15th day of the second month. The Union asked the Employer to advise the employee to pay his dues, i.e., the full three months' amount, or the Employer would remove him. When the employee failed to make payment, he was discharged. We decided that the Union violated Section 8(b)(2) of the Act, and the Employer violated Section 8(a)(3), by enforcing the union security clause for nonpayment of advance dues.

It is well settled that a union cannot require the payment of union security dues for past periods of time when employees had no obligation to maintain union membership. See, e.g., Int'l Union of Op. Engineers, Local No. 139 (Camosy Construction Co., Inc.), 172 NLRB 173 (1968). The Board in Camosy Construction did not decide whether the union's demand for advance dues in that case also was unlawful. Id. at 174, note 2. However, in Alcoa Construction Systems, Inc., 212 NLRB 452, 456-7 (1974) the Board found Section 8(b)(2) and 8(a)(3) violations where an employee was discharged for a dues delinquency which had not yet occurred. In Alcoa, the past practice was that the discharge provisions of a union security clause were invoked after an employee's dues were six months' delinquent. The Board adopted the Administrative Law Judge's findings of violations where an employee was discharged for nonpayment of dues for only

a five month period. In his underlying opinion, the Judge stated that the union could not cause a discharge "for nonpayment of dues... when they were not delinquent." Id. at 457. Based on these two cases, we decided that the discharge in our case, for failure to pay advance dues, was unlawful.

First, the Union could not foresee whether an employee would be obligated to maintain his or her membership in the future months. It could not be foretold, for example, whether the employee would end his or her employment or transfer to a non-unit job. Thus, under Camosy, the discharge for nonpayment of advance dues unlawfully required dues payment for periods when the employee may have no obligation to maintain Union membership. Further, under Alcoa, the discharge was unlawful because the advance dues were not yet delinquent.

In deciding to issue complaint, we were careful to note that a union can bill its members for advance dues. However, it could not, in our view, seek the discharge of an employee for nonpayment of advance dues.

SECTION 10(j) Authorizations

During the fourth calendar quarter of 1987 the Board authorized a total of 11 Section 10(j) proceedings. Most of these cases fell within factual patterns set forth in General Counsel Memoranda 79-77 and 84-7. As contemplated by these memoranda, these cases are described in the chart set forth below. For a fuller description of the case categories, the reader is directed to General Counsel Memoranda 79-77 and 84-7. However, one case was somewhat unusual, and therefore warrants special discussion.

In this case, the Region had issued a Section 8(a)(1) and (3) complaint against a "single employer" under the Act, i.e., three closely related companies which were commonly owned, operated and controlled. Two of them were manufacturing businesses operating in the same building, and the third entity was a real estate holding company which owned the building. During the summer of 1987, the Union commenced an organizational drive among the employees of both manufacturing companies. The Region concluded that there was reasonable cause to believe that the companies had engaged in coercive threats against their employees, and that one company implemented a discriminatory layoff of eight employees known to be active in support of the Union. In November this latter company substantially closed its operations and laid off almost all of its employees. The Region

concluded that this closure was discriminatorily motivated and forseeably chilled union activities in the remaining portion of the Employer's operation. Meanwhile, the other manufacturing business, which remained in operation, discharged two employees who were active in support of the Union's extant organizational drive in that business. In December the Region learned that the Respondents were in the process of seeking a buyer for the businesses and/or the real property. Respondents were unwilling to agree with the Region's request to informally escrow funds or post a bond to cover their potential backpay liability of some $48,000 to the alleged discriminatees.

Based on these facts, we concluded that Section 10(j) relief was warranted to protect the Union's nascent organization drive, and protection was also needed to guarantee the Respondents' ability to comply with a backpay award to the discriminatees under a Board order in due course. Therefore, we sought a 10(j) injunction against all three Respondent companies that: a) would sequester $48,000 from the sale or liquidation of Respondents' assets, and would proscribe the dissipation or improper dispersal of their assets; b) would enjoin the commission of unlawful threats and layoffs and would require the affirmative reinstatement of the two discharged discriminatees to the still operating manufacturing business; and c) would require the creation of a preferential hiring list for the employees discriminatorily laid off by the closed business for any job vacancies for which they were qualified in either the operating company or the closed business if it should reopen.

The District Court granted in substantial part the relief requested by the Board.

The 11 authorized cases fell into the following categories, as defined and described in General Counsel Memoranda 79-77 and 84-7:

	Category	Number of Cases in Category	Results
1.	Interference with organizational campaign (no majority)	1	Lost case.
2.	Interference with organizational campaign (majority)	3	One case settled after petition filed; two cases are pending.
3.	Subcontracting or other change to avoid bargaining obligation	2	One case settled before petition filed; one case settled after petition filed.
4.	Withdrawal of recognition from incumbent	0	------
5.	Undermining of bargaining representative	1	Case settled before petition filed.
6.	Minority union recognition	0	------
7.	Successor refusal to recognize and bargain	2	One case settled after petition filed; lost other case in substantial part.
8.	Conduct during bargaining negotiations	0	------
9.	Mass picketing and and violence	0	------
10.	Notice requirements for strike or picketing	0	------
11.	Refusal to permit protected activity on property	0	------

Category	Number of Cases in Category	Results
12. Union coercion to achieve unlawful object	0	------
13. Interference with access to Board processes	0	------
14. Segregating assets	2	Won one case; other case dropped due to to changed circumstances.
15. Miscellaneous	0	------

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
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QUARTERLY REPORT OF THE GENERAL COUNSEL

This report covers cases decided during the second quarter of calendar year 1988. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I have sought and obtained Board authorization to institute injunction proceedings under 10(j) of the Act.

Rosemary M Collyer

Rosemary M. Collyer
General Counsel

EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

Denial of Neutral Translator at Investigatory Interview

During this quarter, we considered whether an employer unlawfully denied a non-English speaking employee's request for a neutral translator during an investigatory interview.

The Union had recently been certified and was bargaining with the Employer for an initial agreement. No Union stewards had yet been designated to represent the employees. The employee involved had been the Union's principal organizer and was serving on the Union's negotiating committee.

The Employer had complained to the Union about alleged sabotage in a department where the employee worked by himself. When the Union questioned the employee, he denied any wrongdoing and explained that the breakage was due to defective materials. Several days later, the employee was called into an Employer official's office for questioning about the breakage. Present were two supervisors who were the employee's accusers. The employee was Spanish-speaking and understood little English. Therefore, the vice president's questions and the employee's answers were translated by one of the supervisors.

The employee asserted that he did not trust the supervisor to be his translator because the supervisor was one of his accusers. The employee requested another translator but did not make a request for any particular individual. When the Employer denied that request, the employee refused to continue the interview. The employee was then suspended for insubordination for refusing to answer the Employer's questions.

We decided that the Employer violated Section 8(a)(1) of the Act by refusing to grant the employee's request for a neutral translator, and also by suspending the employee for refusing to continue without that assistance.

Under NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975), an employee has a Section 7 right to have a representative present, upon request, at a investigatory interview which the employee reasonably believes might lead to disciplinary action. Further, an employee may not be disciplined for refusing to participate in such an interview after having been denied requested representation. ILGW v. Quality Manufacturing Co., 420 U.S. 276

(1975). These Weingarten rights exist only for employees who have a collective bargaining representative. Sears, Roebuck & Co., 274 NLRB 230 (1985).

In our case, the employee reasonably believed that the Employer's investigatory interview might lead to discipline. Since there was a bargaining representative, the requirements for Weingarten assistance were satisfied. We decided that the employee's request for a neutral translator was a request for Weingarten assistance. Given the employee's inability to speak or understand English, the request for a "friendly" translator was precisely the kind of assistance needed during a Weingarten interview. The fact that the employee did not ask for a Union representative did not require a contrary result. In the first place, Union representatives had not yet been appointed. In any event, there was no guarantee that any available Union representative would have the necessary linguistic skills to assist the employee. In these circumstances, the employee had a Weingarten right to a translator, even if the translator was not also a Union representative.

EMPLOYER DISCRIMINATION

Pension Trust Fund Forfeiture of Past Service Credits

We considered an interesting case in which a Pension Trust Fund promulgated a new rule forfeiting an employee's past service credits if the employee went to work for a noncontributing employer in the same industry.

The Employer and the Union were signatory to a bargaining agreement which established a jointly administered Pension Trust Fund. The Pension Fund's benefit plan provided for the payment of pension benefits based primarily upon the number of years that an employee had worked for an employer-contributor to the Pension Fund. In addition, the Fund granted past service credits, i.e., additional pension credit for years of work performed before the employer began making contributions to the Fund. Past service credits therefore represented an unfunded liability for the Pension Fund.

Our case arose when the Pension Fund trustees issued a new rule which forfeited past service credits if an employee left the

employment of the contributing employer and went to work for a noncontributing employer in the same industry. Since only Unionized employers were contributors to the Fund, the effect of the new rule was to penalize employees who went to work for non-Union employers.

We decided that the Pension Fund was a statutory employer and that the Fund's new forfeiture rule discriminated against employees who exercised their Section 7 right to work for a non-Union employer. We therefore concluded that the Fund's discriminatory rule would be unlawful, absent evidence showing that its forfeiture rule was promulgated for a legitimate business reason.

In prior cases, the Board has held that health and welfare trust funds are statutory employers. See, e.g., Oregon Teamsters' Security Plan Office, 119 NLRB 207, 208 (1957), on remand from 353 U.S. 313 (1957); Miners' Welfare, Pension and Vacation Funds, 256 NLRB 1145 note 1, 1156 (1981). The Board also has found that a statutory employer who engages in unlawful discrimination against the employees of other employers violates the Act. In A.M. Steigerwald Co., 236 NLRB 1512 (1978), a credit union maintained in its bylaws a rule which limited credit union membership to employees of nonunion employers. The Board found that the credit union violated Section 8(a)(1) when it sent a notice to employees advising them of the adverse consequences that would flow from their choosing a union in a pending Board election. The Board found that the credit union's notice unlawfully threatened the employees with loss of benefits if they selected a union.

We decided that the Pension Fund's forfeiture rule had a similar discriminatory effect because it inhibited employees from exercising their Section 7 right to work for non-Union employers.

We concluded that Lodge #199 of District #12, IAM (Baltimore Rebuilders, Inc.), 235 NLRB 1491 (1978), enfd. 611 F.2d 1372 (4th Cir. 1979) was distinguishable. In that case, a pension fund plan provided for the automatic forfeiture of past service credits for employees of any contributing employer which terminated its fund participation, unless the termination resulted from the employer's going out of business. In other words, past service credits were forfeited if an employer terminated its participation by going nonunion, but were not forfeited if an employer terminated by going out of business. The General Counsel argued that the effect of this forfeiture provision was to inhibit the employees from freely choosing to

oust the union as representative. The Administrative Law Judge, with Board affirmance, found no violation. The Judge noted that employees of all employers who terminate participation but stay in business are treated the same, i.e., past service credits are lost regardless of whether such employers terminated participation because they become non-union or for some other reason. The Judge therefore found that the forfeiture provision gave no "unjustifiable encouragement or discouragement of union membership." 235 NLRB at 1498.

We considered the alleged violation in Baltimore Rebuilders to be markedly different from the alleged discrimination in our case. In that case, the disparity was between employers who stayed in business and employers who went out of business. There was no violation, because that disparity was not along Section 7 lines. In our case, the disparity is between employees who go to work for non-Union firms and those who go to work for Union firms. Thus the disparity is along Section 7 lines.

Since the forfeiture rule in our case discriminated along Section 7 lines, it constituted unlawful discrimination unless the Pension Fund could demonstrate that the rule was promulgated for legitimate business considerations. With respect to whether that showing had been made, we noted that employees who left the industry were allowed to retain their past service credits. It was only those who went to work for non-Union employers who lost the credits. Thus, in that sense, a legitimate business reason was not shown. Nor was there any other showing of a nondiscriminatory actuarial reason for the Rule. Accordingly, we decided that the forfeiture rule was unlawful.

Denial of Pay to Injured Football Players During Strike

One case grew out of the strike in professional football. In that sport, it is typical for unit employees to sign individual contracts with their respective teams. In our case, each of the individual contracts provided that an injured player would continue to receive his salary, provided that he submitted to rehabilitation. Prior to the strike, a number of players were receiving their salaries under these provisions. The players were permitted to receive rehabilitation at their geographic place of residence, rather than at the team training facility. In connection with the strike, the Employers, through their management council, adopted rules to deal with these players. In

essence, the rules provided that a player who refused to cross a picket line, and thereby refused to report for rehabilitation at the training facility, would no longer receive his salary. The Employers applied these rules to several players.

We concluded that the Employers' rules and their application were unlawful.

In Texaco Inc., 285 NLRB No. 45, the Board stated it would use the following test to determine whether an employer acts unlawfully when it refuses to continue benefit payments to disabled employees upon the commencement of a strike. The General Counsel bears the prima facie burden of proving some adverse effect on employees rights by showing "(1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike." Accrued benefits are those that are "due and payable on the date denied", i.e., they "do not depend on return to work or on any future services to the employer, but rather arise out of the existence of the employment relationship itself." The employer must then demonstrate a legitimate business justification for its conduct, e.g., union waiver of statutory rights or reliance on "a non-discriminatory contract interpretation that is 'reasonable and... arguably correct'...." (Emphasis in original). Even if an employer can demonstrate such justification, its conduct may still be unlawful if it is inherently destructive of employee rights or is shown to be motivated by anti-union considerations.

We concluded that the evidence in our case satisfied the two-part prima facie showing. The Employers were contractually bound to pay salaries to injured players. These payments were not conditioned on a later return to work or on the performance of future services. Indeed, the relevant provision stated that "if player's injury results in death the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary, or in the absence of a stated beneficiary to his estate." Thus, the benefits were payment for past services or past work performed, rather than compensation for contemporaneous or future delivery of services. Thus they were accrued.

We also concluded that the benefits were denied because of the strike. The players were receiving their salaries prior to the strike. Upon the commencement of the strike, the Employers made non-support of the strike a condition of the benefits. In this regard, we noted that, in several situations, the Employers explicitly stated that non-support of the strike was a condition for receiving the benefits. In other cases, the Employers said

that "coming home" for treatment was a condition for receiving the benefits. This condition was not imposed until after the strike. In these circumstances, the strong inference is that "coming home" for treatment was simply the means by which the player would show that he was not supporting the strike.

The Employers contended that they had a legitimate and substantial business justification for insisting that rehabilitation be at the team facilities. If that requirement had been imposed prior to the strike, it may well have been lawful for the Employers to insist that players report for rehabilitation at the team facility in order to receive payments. However, as discussed above, the requirement was belatedly imposed after the strike as a discriminatory means of ascertaining who supported the strike and who did not.

Permanent Subcontracting During a Lockout

During this quarter, we considered a case involving an employer who permanently subcontracted a substantial portion of unit work during an otherwise lawful lockout.

The parties began negotiations for a new collective-bargaining agreement covering a unit of production and maintenance employees. After several months of bargaining, the Employer locked out all unit employees and continued operating the plant using temporary employees, salaried employees and temporary subcontractors. In particular, the Employer temporarily subcontracted all of its maintenance work.

Two months later, the Employer told the Union that it was conducting a cost analysis of the possibility of permanently subcontracting its maintenance work. Based on the study, the Employer thereafter proposed to permanently subcontract its maintenance work. The Union rejected the proposal. Further negotiations on the subject eventually reached impasse. At that point, the Employer signed an agreement with the existing subcontractor for the performance of maintenance work on a permanent basis.

We decided that, in the context of the lockout, the Employer's permanent replacement of unit employees by means of permanent subcontracting violated Section 8(a)(3) of the Act. We also decided that the appropriate remedy for this violation

should include backpay for all of the unit employees during the period of unlawful subcontracting.

In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) the Supreme Court set forth a test to be used in cases involving alleged employer discrimination:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

In accord with these principles, an employer may lawfully impose a lockout in support of its bargaining position. American Ship Building Co. v. NLRB, 380 U.S. 300 (1965). The impact of the lockout on the employees' Section 7 rights is "comparatively slight" because the employees can recover their jobs by agreeing with the employer's proposals. And the employer's business justification is legitimate and substantial because it is in support of a good faith bargaining position.

The same result obtains when an employer locks out and also hires temporary replacements. Harter Equipment Inc., 280 NLRB No. 71 (1986). Again, the impact on Section 7 rights is slight because the employees can recover their jobs by agreeing with the employer's bargaining proposals. And the employer has a legitimate business justification because the employer is acting in support of a good faith bargaining position and to keep the business operational.

The situation is markedly different when the employer locks out and hires permanent replacements. The locked out employees cannot recover their jobs by conceding their bargaining position. The employees would therefore reasonably infer that their loss of jobs is not the result of mere bargaining pressure. For, even if they accept the employer's bargaining proposals, they will not get their jobs back. Rather, such employees would reasonably

infer that they lost their jobs because they engaged in the bargaining process. That is, but for the fact that they engaged in collective bargaining, they would not have been locked out and permanently replaced. These employees would be extremely reluctant to attempt collective bargaining in the future. Accordingly, a lockout with permanent replacements is unlawful because it is "inherently destructive" of the fundamental Section 7 right of collective bargaining.

Alternatively, even if the impact on employee rights of this employer conduct were considered to be "comparatively slight," it still would lack a legitimate and substantial business justification. The only apparent business justification is the employer's desire to prevail in its bargaining position. However, the employer can prevail by locking out and temporarily replacing the employees until they concede their bargaining position. There is no justification for taking the additional step of depriving employees of their jobs after these employees have yielded to the employer's bargaining demands.

We recognized that our case involved permanent subcontracting of the work rather than permanent replacement of the employees. In our view, however, the impact on employees was the same. It mattered little to the employees whether they lost their jobs to newly hired permanent employees or to the Employer's permanent subcontractor. In either event, the employees could not recover their jobs even if they agreed with the Employer's bargaining position. Therefore, the permanent replacement of employees by means of permanent subcontracting, in the context of the lockout, violated the Act. In addition, we concluded that the lockout itself was unlawful. The lockout was aimed, in part, at forcing the Union's agreement to the Employer's unlawful subcontracting. Therefore, the lockout had an unlawful objective.

As a remedy, we decided to seek backpay for the locked out maintenance employees who had been unlawfully replaced by the permanent subcontracting. The Employer argued that, even if there had been no permanent subcontracting, the parties' bargaining dispute would have remained unresolved and the maintenance employees would have remained locked out. We decided, however, that it was entirely speculative as to what would have happened if there had been no unlawful subcontracting. The parties' impasse bargaining over the unlawful subcontracting had cast a pall over the bargaining process. It is entirely possible that, but for this factor, the bargaining dispute would have been resolved and the lockout ended. In any event, there

was no basis to conclude the opposite, i.e., that the bargaining dispute necessarily would have remained unresolved even if there had been no unlawful subcontracting. It is well settled that the wrongdoing employer bears the risk of this uncertainty. See, e.g., Remington Rand Corp., 2 NLRB 626, 737-9 (1937), enfd. 94 F.2d 862, 872 (2d Cir. (1938). Therefore, the Employer had not rebutted the normal remedy of backpay.

A backpay remedy also is in accord with Abilities and Goodwill, Inc., 241 NLRB 27 (1979), enf. den. 612 F.2d 6 (1st Cir. 1979). In that case, the Board awarded backpay to discharged strikers despite the arguement that the strike would have continued even if there had been no unlawful discharges. The Board relied upon equitable considerations in awarding backpay. In our view, the equities weighed even more heavily in favor of backpay in our case. In the strike situation in Abilities and Goodwill, Inc., the employees were voluntarily withholding their services; in our case, the employees were involuntarily locked out.

We also decided to seek backpay for the production employees in the locked out unit. As with the maintenance employees, it was entirely speculative as to whether the parties would have reached agreement but for the unlawful subcontracting. Concededly, unlike the maintenance employees, the production employees were free to return to work by conceding their bargaining position. However, this would have included agreeing to the Employer's unlawful subcontracting proposal, i.e., agreeing to the unlawful replacement of fellow unit employees. We therefore decided that these employees also should receive backpay for having been unlawfully locked out.

UNION RESTRAINT OR COERCION

Union Fining of Supervisor for Reporting Employee Threat

We considered a case involving whether a Union violated Section 8(b)(1)(B) by trying and fining a supervisor because he had reported to the Employer an alleged threat made by an employee.

The supervisor had instructed an employee to begin operating his machine. The employee stated that the absence of a light

above the machine was a safety violation and that, under the bargaining agreement, he could refuse to operate the machine. The other employees in the seven member crew could not work while the machine was not operating. The supervisor told the entire crew to go back to work and let the Union handle the alleged safety matter.

A short time later, an employee-member of the crew allegedly threatened the supervisor because of the machine light incident. The supervisor reported the alleged threat, and the employee was suspended for three days. Later, the supervisor was brought up on internal Union charges for having reported the employee's threat. The Union tried and fined the supervisor for his conduct.

We decided that the Union's conduct against the supervisor coerced the Employer in violation of Section 8(b)(1)(B).

Section 8(b)(1)(B) prohibits a union from restraining or coercing an "employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." In interpreting this Section, the Board initially restricted it to situations where a union tried to force an employer to replace its bargaining agent or grievance adjuster. See, e.g., Helen Rose Co., 127 NLRB 1543 (1960). The Board later expanded its interpretation in San Francisco Oakland Mailers Union, 172 NLRB 2173 (1968). There, the union expelled a supervisor from membership because he had allegedly assigned unit work contrary to the bargaining agreement. The Board found a violation. In the Board's view, the supervisor was disciplined because of the manner in which he had construed the collective-bargaining agreement.

In Florida Power & Light Co. v. Electrical Workers, 417 U.S. 790 (1974), the Supreme Court said that a union's discipline of a supervisor-member violated Section 8(b)(1)(B) "only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer." The Court also said that it would assume that the Board's Oakland Mailers decision was within the outer limits of this rule. Id. In NLRB v. Electrical Worker Local 340 __U.S.__, 125 LRRM 2305 (May 18, 1987), the Supreme Court repeated the above test, and then added that an adverse impact on Section 8(b)(1)(B) activity "exists only when an employer representative is disciplined for behavior that occurs while he or she is engaged in 8(b)(1)(B) duties -- that is, collective bargaining or grievance adjustment or any

activities related thereto." [emphasis added]. Two months later, the Board found a Section 8(b)(1)(B) violation in J.H. McNamara, 284 NLRB No. 145 (1987) where a union tried and suspended a plant manager for having reported that an employee was asleep on the job.

In our case, the supervisor was construing the contract when he told the employees that they had no right under the contract to refuse to work because of the machine light. The employee threat and the report thereof grew directly out of that construction of the contract. Thus, the supervisor's reporting of the threat was "related to" the performance of a Section 8(b)(1)(B) function. Finally, the Board in J.H. McNamara found that a supervisor's action of reporting an employee for misconduct fell within Section 8(b)(1)(B). We therefore decided to argue that the Union's fine violated Section 8(b)(1)(B) because a sufficient nexus existed between the supervisor's report and his role as Section 8(b)(1)(B) representative.

Union "Observer" at Neutral Gate

During this quarter, we considered whether a union violated Section 8(b)(4)(B) by placing an "observer" at the neutral gate of a building project.

The Employer was acting as general contractor for the construction of a new building. The Employer hired a nonunion subcontractor for some work. A few days later, a picket appeared at the building site carrying a sign which advised the public that the nonunion subcontractor was "Breaking Down the Established Wage and Working Conditions" of the Union. In response, almost all the building project employees left the site.

The Employer immediately set up a reserved gate system for the entrances to the site. A primary gate was reserved exclusively for the use of the nonunion subcontractor, its employees and suppliers. Neutral gates were reserved for the other subcontractors and for the Employer. The Employer notified the Union of the reserved gate system and also advised its employees and the other subcontractors of the new system.

The following day, the Employer saw a woman standing at one of the neutral gates and wearing a sign: "[Union's Name]

Observer." The Employer asked the observer to move to another neutral location from which the gate could still be observed. The observer refused, stating that she had been instructed to stand where she was. On that day, only about 30 of the 200 building project employees worked at the site. Later that day, the Employer advised the Union that the nonunion subcontractor was being removed from the building site.

We decided that the presence of the "observer" was a "signal" to neutral employees to induce them to refrain from work.

It is well established that a union violates Section 8(b)(4)(B) when it pickets a neutral gate after a reserved gate system has been properly established. See, e.g., Sacramento Area Dist. Council of Carpenters (Malek Constr. Co.), 244 NLRB 890 (1979); Laborers Local 383 (Hensel Phelps), 268 NLRB 129 (1983). Traditional forms of picketing are not a sine qua non for this kind of violation. See, Local No. 274, Plumbers (Stokely-Van Corp. Inc., 267 NLRB 1111, 1114 (1983) where persons carried signs reading "Local Observer;" District 65, Distributive Workers (SNS Distributing Service), 211 NLRB 469, 474 (1974). A union's characterization of a representative as an "observer" rather than a picket is not dispositive when the alleged observer acts as a "signal" to employees of neutral employers. Stokely-Van Corp., supra. See also, Iron Workers, Local 433 (Robert E. Mckee, Inc.), 233 NLRB 283, 287-88 (1977).

In our case, the Union's "observer" at a neutral gate had the effect of virtually shutting down the jobsite. The observer also insisted on standing directly in front of the neutral gate, even though observation could have been achieved from another location, e.g. across the street. Finally, the Union had no apparent need to monitor the neutral gate with an observer since the Union was not claiming that the neutral status of the gate had been breached. We therefore decided that the alleged "observer" instead was a "signal" picket in violation of the Act.

We decided that the charge should not be dismissed as moot even though the unlawful signal picketing had lasted less than one day and then ceased. The picketing stopped only because it had achieved its desired effect of forcing the Employer to cease doing business with the nonunion subcontractor.

Public Demonstrations as Union Picketing

A case arose involving whether a union violated Section 8(b)(4)(B) and/or 8(b)(7)(C) by conducting public demonstrations and marches in a downtown city area.

The Union represented the janitorial employees of a janitorial services company which had been working in an office building plaza. The plaza manager awarded the janitorial services contract to a different company which was nonunion. A few days later, a group of individuals distributed leaflets around the plaza. The leaflet stated that the new, nonunion janitorial services company paid substandard wages and benefits. The leaflet also urged people to call the new company and encourage it to offer employment to the employees of the old company.

Two months later, the Union held a rally in a city park across the street from the plaza. After the rally, the Union marched through the downtown city area to publicize its campaign to organize janitorial employees throughout the area. The Union also distributed a leaflet which announced future demonstrations to be held at the plaza every Thursday at noon and 5:00 p.m.. Several demonstrations were then held weekly at the plaza, with from 25 to 50 people attending each time.

The demonstrators usually used bull horns for speeches, distributed leaflets, and carried or wore signs reading "Justice for Janitors." On one occasion, around 30 demonstrators gathered near the entrance to the plaza. The demonstrators carried signs and distributed leaflets stating that the plaza manager was using a nonunion contractor that paid substandard wages. On another occasion, demonstrators gathered in the plaza in front of a bank that is managed by the plaza manager. The demonstrators stood in the bank entrance walkway while listening to speeches and holding or wearing "Justice for Janitors" signs. There was no evidence that the Union ever requested anyone to boycott or cease patronizing the plaza or its tenants. Nor was there any evidence that the Union's demonstrations ever had the effect of causing any disruption with the daily operations at the plaza.

We decided to dismiss the charges because the Union had not engaged in any picketing or other coercive conduct.

In DeBartolo Corp v. Florida Gulf Coast BCTC, ___U.S.___ (No. 86-1461, April 20, 1988), the Supreme Court held that

Section 8(b)(4)(B) does not proscribe peaceful handbilling, unaccompained by picketing. The Court noted that "there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving nonspeech elements, such as patrolling." Sl. op. at 5. The Court therefore interpreted the Section 8(b)(4)(ii) language "threaten, coerce or restrain" as excluding nonpicketing activities involving free speech.

Under that view, the Union's demonstrations here did not involve picketing or other unlawful coercive conduct. The Union's demonstrations, using handbills, bull horns, rallies, and parades with signs, were designed to communicate a message; they were not "signals" designed to induce work stoppages or interruptions with deliveries. Since the Union's demonstrations were more akin to free speech than coercive picketing, any alleged Section 8(b)(4) violation would raise serious constitutional questions. Accordingly, under DeBartolo, we declined to construe 8(b)(4)(B) to cover the conduct.

In addition, the Board has held that "patrolling and the carrying of placards... does not per se establish that 'picketing' in the sense intended by Congress was involved." Alden Press Inc., 151 NLRB 1666, 1669 (1965). "One of the necessary conditions of picketing is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises." Id. at 1969, citing NLRB v. United Furniture Workers of America, 337 F.2d 936, 940 (2d Cir. 1964). In our case, the Union's activity involved no such element of confrontation. The Union's demonstrations at or near the plaza and throughout the downtown area were, as in Alden Press, "general parading through large public areas" not designed to "dissuade customers or others from patronizing the establishments.... to halt deliveries or to cause employees to refuse to perform services." Id. Further, unlike traditional picketing, the demonstrations here were held weekly, at noon and 5 p.m., and were not confined to any particular location or entranceway. We therefore concluded that the Union's conduct did not constitute "picketing" and thus did not violate Section 8(b)(7)(C).

Union's Disclaimer of Representational Interest as Section 8(b)(4)(B) Violation

During the quarter, we considered whether a union's disclaimer of any interest in representing an employer's employees amounted to unlawful secondary pressure under Section 8(b)(4)(B), where the union's disclaimer was for the express purpose of forcing another employer to sign a union contract.

The Employer was one of several subsidiaries of a parent corporation. The Employer was signatory to a Section 8(f) agreement with the Union; one of the other subsidiaries was nonunion. The evidence established that the Employer and the nonunion subsidiary were separate employers. For several years, the Union had tried unsuccessfully to compel the Employer to force the nonunion subsidiary to sign a union contract.

In 1985, the Union adopted a policy that forbade union contractors from having double-breasted operations, i.e., from having a related company as a nonunion operation. The Union announced that it would no longer represent employees of an employer if it were related to a company that refused to sign a Union contract. The Union also advised its members that it would discipline any member who worked for a contractor as to whom the Union had terminated a bargaining relationship.

Near the expiration date of the Employer's Section 8(f) contract, the Union informed the Employer that it would not renew the contract and would disclaim any further interest in representing the Employer's employees. The Union said that it was taking these actions because the related company was non-Union. Some employees asked the Union what would happen if they continued working for the Employer. The Union referred those employees to the Union rule set forth above.

We decided that the Union's disclaimer of interest violated Section 8(b)(4)(B). The evidence was clear that the Union acted against the Employer in order to achieve an objective elsewhere, i.e., to force a separate employer to sign a Union contract. The evidence also indicated that the Union's disclaimer would cause the Employer to lose future commercial contracts because of its nonunion status. In these circumstances, the Union's disclaimer constituted Section 8(b)(4)(ii) coercion for a secondary objective. See, Ets Hokin Corp., 154 NLRB 839, 842 (1965), enfd. 405 F.2d 159 (9th Cir. 1968). We also decided that the Union threatened its members with Union sanctions if the employees

continued to work for the Employer as a nonunion contractor. These threats amounted to a Section 8(b)(4)(i) inducement to strike for the same unlawful objective.

In our view, John Deklewa & Sons, Inc., 282 NLRB No. 184 (1987) did not require a contrary result. In that case, the Board held that parties to a Section 8(f) relationship do not have any bargaining obligation after the expiration of their Section 8(f) agreement. The Union's disclaimer of interest, therefore, did not amount to a refusal to bargain in violation of Section 8(b)(3). However, the Deklewa decision did not deal with Section 8(b)(4)(B). That section prohibits a union from coercing an employer for a secondary objective. In the instant case, the Union's termination of the bargaining relationship was for an unlawful objective.

Section 10(j) Authorizations

During the second calendar quarter of 1988 the Board authorized a total of 13 Section 10(j) proceedings. Most of these cases fell within factual patterns set forth in General Counsel Memoranda 79-77 and 84-7. As contemplated by those memoranda, these cases are described in the chart set forth below. For a fuller description of the case categories, the reader is directed to General Counsel Memoranda 79-77 and 84-7. However, one case was somewhat unusual, and therefore warrants special discussion.

In this case the Region had issued a Section 8(a)(3) complaint alleging that the Employer had unlawfully refused to reinstate unfair labor practice strikers to their former jobs upon their unconditional offers to return to work. The affected employees had recently voted in favor of Union representation, and among the unfair labor strikers whom the Employer refused to reinstate were a number of Union officials or members of the Union's bargaining committee.

Based on these circumstances we concluded that 10(j) relief was warranted to compel the Employer to immediately reinstate the unfair labor practice strikers to their former positions, displacing, if necessary, any replacement employees. Absent such relief, the absence of these individuals from the unit could, pending Board litigation, permanently chill employee interest in

unionization as well as undermine the Union's effectiveness in the future bargaining negotiations.

The District Court granted the requested relief, and denied the Employer's request for a stay of the decree pending an appeal. The Employer's appeal is currently pending before the Court of Appeals.

The thirteen authorized cases fell in the following categories, as defined and described in General Counsel Memoranda 79-77 and 84-7:

Category in Category	Number of Cases	Results
1. Interference with organizational campaign (no majority)	1	Settled case after petition.
2. Interference with organizational campaign (majority)	0	------
3. Subcontracting or other change to avoid bargaining obligation	2	Won one case; other is pending.
4. Withdrawal of recognition from incumbent	2	Settled one case after petition; other case is pending.
5. Undermining of bargaining representative	1	Won case.
6. Minority union recognition	1	Settled case after petition.
7. Successor refusal to recognize and bargain	2	Settled one case after petition; other case is pending.
8. Conduct during bargaining negotiations	0	----

9. Mass picketing and violence	0	----
10. Notice requirements for strike or picketing (8(d) and 8(g))	0	----
11. Refusal to permit protected activity on property	0	----
12. Union coercion to achieve unlawful object	0	----
13. Interference with access to Board processes	2	Won one case; other case settled after petition.
14. Segregating Assets	2	Won one case; other case settled before petition.
15. Miscellaneous	0	----

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE (R-1829)
November 10, 1988 202/632-4950

WILLIAM GARRETT STACK IS APPOINTED NLRB DEPUTY ASSOCIATE GENERAL COUNSEL

National Labor Relations Board General Counsel Rosemary M. Collyer today announced the appointment of William Garrett Stack, a career NLRB attorney since 1965, as Deputy Associate General Counsel in Operations Management.

Mr. Stack, 55, will be the second-ranking official in the Division of Operations Management, which supervises all NLRB field activities and coordinates the operations of the field offices with the Washington headquarters offices of the General Counsel. As deputy to Associate General Counsel Joseph E. DeSio, he will serve in the position formerly held by Eugene L. Rosenfeld, who will be the Assistant General Counsel overseeing District 3 of the field operations. Mr. Rosenfeld also will continue chairing the General Counsel's Special Committee on Long Range Planning.

In making the appointment, General Counsel Collyer said, "With a distinguished record as an attorney and a manager, Garrett Stack is superbly qualified for this important position. I am also pleased that Gene Rosenfeld will be able to continue with his planning responsibilities."

Mr. Stack, an NLRB attorney since law school graduation in 1965, had been Assistant General Counsel supervising NLRB offices in the western portion of the United States (District 6) since 1975. Previously, he was Deputy Assistant General Counsel in the Division of Operations-Management (1973-75) and Litigation Specialist in the Peoria Subregional Office (1965-73).

Born in Kansas City, Missouri, Mr. Stack received his B.S. degree in Industrial Relations from Rockhurst College, Kansas City, in 1962. He received his law degree in 1965 from the University of Missouri at Kansas City and was admitted to the Missouri Bar.

Mr. Stack is married to the former Sylvia Jane Goodbrake of Clinton, Missouri. They have three grown children, Anna Marie, Gilbert, and Benjamin. The family resides in Annandale, Virginia.

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